WALLACE NESBITT, K. C.

THE LAW

OF

FIRE INSURANCE

IN CANADA

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CANADA

WITH A COMPLETE ANALYSIS OF THE JURISPRUDENCE AND OF THE STATUTE LAW OF THE DOMINION

BY

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PREFACE

The writer's aim in this work has been to afford some practical assistance to the Canadian lawyer when called upon to determine the rights of the parties under a fire insurance contract. I such a case special difficulties confront him. The general principles of insurance law are, in Canada, modified by local statutes, and the statute law itself is not uniform, but differs widely in the various provinces.

Again, in the questions which commonly arises for consideration, little assistance can be obtained from the English cases, because there are no statutory enactments in England which interfere with the freedom of contract between the insurer and the insured, and the jurisprudence in the United States is so inharmonious, that in many branches of insurance law, notably in cases in which agency is involved, authority can be found both ways for most propositions of law which arise.

The writer has only attempted to expound the law of fire insurance as determined by the decisions of the Canadian courts, and has cited English and American cases where they illustrate or support such decisions.

In Chapter I, the writer has attempted to show the advantage of a uniform policy of fire insurance for Canada. After writing the succeeding chapters of the book, he has been still more strongly impressed with that view. It may be worth while stating a few of the reasons more in detail.

Legislation with respect to the conditions which alone shall govern fire insurance contracts, has been adopted in all the provinces of Canada except New Brunswick and Prince Edward Island, yet in no two provinces are these conditions the same.

The differences are often immaterial, but occasionally they are very substantial. Where a legal decision of one province is cited in another, this necessitates a careful consideration and comparison of the language used by the Legislature in the two provinces. For example, the provisions by which variations and additions are permitted in Ontario, and which were under consideration by the Privy Council in the Citizens Ins. Co. *v* Parsons (7 App. Cas. 96), are by no means identical with the corresponding articles of the Quebec Insurance Act.

Again, in all the provinces except Manitoba, the statutory conditions are declared to apply to *contracts* of fire insurance, whereas in the latter province it is *policies* of insurance which alone are affected, and the Privy Council has held Queen Ins. Co. *v* Parsons (7 App. Cas. 122) that this does not include a provisional insurance by interim receipt, and of course it also excludes oral contracts of insurance.

In Ontario, Quebec, Manitoba, Alberta, Saskatchewan and British Columbia, the statutory conditions are expressly made applicable to mutual insurance companies, but this is not the case in Nova Scotia. In Manitoba, although the Mutual Companies are governed by the Fire Insurance Policy Act, certain matters void the policy whether material or not, a provision quite inconsistent with the first and third statutory conditions.

These and other incongruities and anomalies which could be pointed out, emphasize the desirability of having some uniform legislative enactment which shall control the relationship between the insurer and the insured. Fire insurance has become so universal in the commercial life of to-day that it is almost as necessary to have the contract fixed and uniform as it is to have the law relating to bills and notes codified in the Bills of Exchange Act.

E. R. CAMERON.

Ottawa, December 1st, 1908.

ADDENDA AND CORRIGENDA

Page 253.—APPLICATION.

Where an application contains a note that the applicant is requested to answer the questions fully, and he failed to make any answer to some of the questions, the Court said that it was impossible to hold that where the company merely "requested" full answers to all questions, they meant to make, and had made, the giving of full answers to all a condition precedent to the validity of the contract. — Rowe *vs* London & Lancashire Fire Ins. Co., 12 Gr. 311.

Page 495.—VARIATION TO CONDITION 4.

By a variation or addition to statutory condition no. 4, it was provided that "When property insured * * or any part thereof shall be alienated, or in case of any transfer or change of title to the property insured, or any part thereof, or of any interest therein, without the consent of this company indorsed hereon, or if the property hereby insured shall be levied upon, or taken into possession or custody under any legal process, or the title be disputed in any proceeding at law or equity, this policy shall cease to be binding upon the company."

Held, affirming the decision of the Court below (26 Gr. p. 113) that this variation of addition was neither just nor reasonable, and was not binding upon the assured.—Sands *vs.* Standard Ins. Co., 27 Gr. 167.

Page 497.—VARIATIONS TO CONDITION 16.

In a policy of insurance, it was provided, by way of variation of statutory condition no. 16 providing for reference under the Arbitration Act in case of differences, that if any difference arose as to the value of the property insured, of the property saved, or the amount of the damages or loss, the same should be submitted to and ascertained by appraisers, one to be appointed

by the assured and one by the company, who were to select an umpire, and that the assured and the company should pay the appraisers respectively selected by each of them, and that each should pay one-half the expenses of the umpire:

Held, that the variation was not binding upon the assured, not being "just and reasonable to be exacted by the company", inasmuch as it was more stringent and onerous than the statutory condition.—Cole *vs.* London Mutual Fire Ins. Co., 15 O. L. R., 619.

Page 539.—EXPERTISE—ARBITRATION.

R. S. Q., art. 5324-5330.

Vide Labbé *vs.* Equitable Mutual Ins. Co., Q. R. 29, S. C. 274; Montmagny Mutual Ins. Co. *vs.* Carbonneau, 16 R. L., 275.

ABBREVIATIONS

A. C.	Law Reports, Appeal Cases.
A. & E.	Adolphus & Ellis's Reports.
All.	Allen, New Brunswick.
Am. R.	American Reports.
Am. Rep.	
App. Cas.	Law Reports, Appeal Cases.
A. R.	Ontario Appeal Reports.
Atk.	Atkyns's Reports.
Atl.	Atlantic Reporter.
B. & Ald.	Barnewall & Alderson.
Barb.	Barbour, N. Y.
B. & C.	Barnewall & Cresswell.
B. C. Rep.	British Columbia Reports.
Bing.	Bingham's Reports.
Bing. N. C.	Bingham, New Cases.
B. & P. N. R.	Bosanquet & Puller, New Reports.
B. & S.	Best & Smith.
Bro. Parl. Cas.	Brown's Parliamentary Cases.
Burr.	Burrow.
Camp.	Campbell's Reports.
Can. S. C. R.	Canada Supreme Court Reports.
C. B. N. S.	Common Bench Reports, New Series.
Ch. D.	Law Reports, Chancery Division.
C. L. J.	Canada Law Journal.
C. L. T.	Canadian Law Times.
C. & P.	Carrington & Payne's Reports.
Cochran	Cochran, Nova Scotia.
Com. L. R.	Commercial Law Reports.
Cowp.	Cowper's Reports.
Cowp. Rep.	
Cro. Eliz.	Croke's Reports, temp. Elizabeth.
D. C. A.	Decisions de la Cour d'Appel.
Dorion Q. B. R.	Quebec, Queen's Bench Reports.
De G. M. & G.	De Gex, Macnaghten & Gordon's Reports.
Dig. Ont. Case Law	Digest Ontario Case Law.
Dow	Dow's Reports.
E. & A.	Error & Appeal Reports, Upper Canada.
E. & B.	Ellis & Blackburn.
Exch.	Exchequer Reports.

Fed. Rep. . . . . Federal Reporter.

Gr. . . . . Grant's Chancery Reports (Ontario).

Han. . . . . Hannay's New Brunswick Reports.
Hare . . . . . Hare's Reports, Chancery.
Hil. T. . . . . Hilary Term, New Brunswick.
H. L. Cas . . . . . House of Lords Cases.
How. . . . . Howard, United States Supreme Court.
H. & W. . . . . Hurlstone & Walsmley's Exchequer Reports.

Ir. L. R. Common Law
Ir. Com. L. Rep. . . . . } Irish Common Law Reports.
Ir. C. L. . . . . Irish Reports, Common Law Series.

J. . . . . Lower Canada Jurist.

K. B. . . . . Law Reports, King's Bench.

L. C. J. . . . . Lower Canada Jurist.
L. C. L. J. . . . . Lower Canada Law Journal.
L. C. R. . . . . Lower Canada Reports.
L. J. C. P. . . . . Law Journal, Common Pleas.
L. N. . . . . Legal News (Quebec).
L. R., C. P. . . . . Law Reports, Common Pleas.
L. R., Eq. . . . . Law Reports, Equity.
L. R. Ex. . . . . } Law Reports, Exchequer.
L. R. Exch. . . . . }
L. R., H. L. . . . . Law Reports, House of Lords.
L. R., P. C. . . . . Law Reports, Privy Council.
L. T. . . . . Law Times.

Man. R. . . . . Manitoba Reports.
Mass. . . . . Massachusetts Reports.
M. L. R., Q. B. . . . . Montreal Law Reports, Queen's Bench.
M. L. R., S. C. . . . . Montreal Law Reports, Superior Court.
Moo. P. C. (N.S.) . . . Moore's Privy Council Cases (New Series).
M. & W. . . . . Meeson & Welsby.

N. B. Eq. . . . . New Brunswick Equity Reports.
N. B. Rep. . . . . New Brunswick Reports.
N. S. Rep. . . . . Nova Scotia Reports.

Old. . . . . Oldright, Nova Scotia Reports.
O. L. R. . . . . Ontario Law Reports.
O. R. . . . . Ontario Reports.
O. W. R. . . . . Ontario Weekly Reporter.

P. & B. . . . . Pugsley & Burbidge, New Brunswick.
P. R. . . . . Practice Reports (Ontario).
Pug. . . . . Pugsley's Reports, New Brunswick.

Q. B. . . . . Queen's Bench Reports, Adolphus & Ellis, New Series.
Q. B. D. . . . . Law Reports, Queen's Bench Division.
Q. L. R. . . . . Quebec Law Reports.
Q. R., K. B. . . . . Quebec Reports, King's Bench.
Q. R., Q. B. . . . . Quebec Reports, Queen's Bench.
Q. R., S. C. . . . . Quebec Reports, Superior Court.

R. C. . . . . Revue Critique.
R. & C. . . . . Russell & Chesley, Nova Scotia.
R. & G. . . . . Russell & Geldert, Nova Scotia.
R. L. . . . . Revue Légale (Québec).
R. de J. . . . . } Revue de Jurisprudence (Québec).
Rev. de Jur. . . . . }
R. de L. . . . . } Revue de Législation (Québec).
Rev. de Leg. . . . . }
R. J. R. Q. . . . . Rapports Judiciaires Revisés de Québec (Mathieu).

S. C. Cas. . . . . Cameron's Supreme Court Cases.
Stevens, N. B. Dig. . . . Steven's New Brunswick Digest.
Stuart's Rep. (L. C.) . . Stuart's Lower Canada Reports.

Thom. . . . . Thomson's Reports, Nova Scotia.
T. R. . . . . Term Reports (Durnford & East).

U. C. C. P. . . . . Upper Canada Common Pleas Reports.
U. C. R. . . . . Upper Canada Queen's Bench Reports.
U. C. R (O. S.) . . . . . Upper Canada Queen's Bench Reports (Old series).
U. S. . . . . United States Reports.

Ves. . . . . Vesey, sen.

Wall. . . . . Wallace, United States Supreme Court.

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CHAPTER I [1]

Introduction. — Origin of the Statutory Conditions. — Federal and Provincial Legislative Jurisdiction.

Probably in no department of commercial activity has a more marked development taken place in Canada during recent years than in that of fire insurance. During the last five years the amount at risk in Canada by all companies has increased at the rate of nearly one hundred million dollars per annum until the total has now reached one thousand five hundred million dollars, for which the insured pay in the neighbourhood of fifteen million dollars per annum. (2)

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(1) This chapter contains the substance of an article by the writer intituled "a Plea for a uniform Contract of Fire Insurance for Canada" in the Can. Law Times, vol. 19, p. 105.

(2) Canada Year Book, 1907.

This growth in the volume of business has been accompanied by new departures in the methods of transacting fire insurance, and by a greater complexity in the nature and character of the risks undertaken, while more intricate problems of insurance are presented to companies for consideration than were dreamed of twenty-five years ago.

In the early days the utmost freedom prevailed in fire insurance as in all other commercial contracts, but in time the unfairness which some companies displayed in the case of perfectly honest losses, led to the interference of the Legislature in the Province of Ontario. The Courts in a number of instances previous to the year 1874 called attention to the great hardship to which the insured was subjected, by the unconscionable nature of the conditions attached to the contract of insurance. In the judgment of the Court in the case of Smith *vs* Commercial Union Ins. Co., (3) after pointing out the complexity and far-reaching nature of some of the conditions, Chief Justice Wilson says:

"This is a degree of inquisitorial power under the penalty of a forfeiture of the insurance money, which it is vexatious and difficult to comply with, and which is about equal to the forfeiture of itself, and almost a perfect immunity to the insurers against their ever paying the money.

"The conduct of companies when enforcing rigidly such conditions, has often been complained of by the Courts, by reason of the number and nature, and difficulty of the conditions they introduce into their policies; and the time perhaps has come when the Legislature should interfere, to stand between them and those they insure or pretend to insure, or, in other words, the public, by limiting them to such conditions which the Courts shall determine to be reasonable.

"Companies are often imposed upon by wilful fires, and by very fraudulent conduct on the part of the assured...

"At present it is a mere system of attack and defence. The

(3) 33 U. C. R., at p. 90.

more fraudulent or felonious the attack, the more numerous, complicated and guarded the defences are. But that is a war calculated only for two very special classes of persons. The honest people are lost sight of, and suffer in the conflict."

Adopting the suggestion of the Courts, the Legislature of Ontario, by 38 Vict., cap. 65, adopted the following legislation:

"A commission is to be issued by the Lieutenant-Governor addressed to three or more persons holding judicial office in this Province, for the purpose of determining what conditions of a fire insurance policy are just and reasonable conditions."

To carry out this legislation, the following Judges were subsequently appointed: The Hon. William Buell Richards, afterwards Chief Justice of the Supreme Court; the Hon. John Godfrey Spragge, afterwards Chief Justice of the Court of Appeal; the Hon. John Hawkins Hagarty, afterwards Chief Justice of the Court of Appeal; the Hon. Samuel Henry Strong, former Chief Justice of the Supreme Court, and the Hon. Christopher Salmon Patterson, subsequently Puisne Judge of the Supreme Court. The Commissioners brought in their recommendations, which are contained in the Act of the following year as 39 Vict., cap. 24. This Act, with some few amendments, contains the statutory conditions now in force in the Province of Ontario.

The original report of the Commissioners has been lost, although a careful search in the provincial archives has been made for it. We are not, however, left entirely in the dark as to its contents, as a copy seems to have been before Chief Justice Armour when preparing his judgment in Parsons *vs* The Queen Ins. Co., (4) where, in discussing the statutory conditions he says: "The Commissioners appended to their report the conditions settled and approved of by them, and stated in their report that these conditions had been settled after consideration of the policies of all the companies doing business in the Province; that suggestions had also been received from several prom-

(4) 2 O. R., 45.

inent merchants, and the policy suggested by a committee of the Dominion Board of Trade had also been made use of; that the Board of Fire Underwriters of Toronto were furnished with a draft of the proposed conditions, and their suggestions and criticisms were received by the commissioners, and when practicable admitted, and the commissioners stated that it was to be hoped, therefore, that these conditions as settled embodied what was reasonable in the views of the two great classes interested, insurers and insured."

The eminence of the members of the Royal Commission is a sufficient guarantee of the value of its report, but the provision that variations might be introduced, indicates that the commissioners did not think every reasonable condition had been exhausted. It is apparent that the usefulness of a standard form is impaired by permitting any variation or addition to be made, and the aim of legislation in the United States has been to give a set of conditions so full and complete that variations may be absolutely dispensed with.

In their practical application various deficiencies were found; some of these have been corrected by later legislation, but others still remain, and a time has come when the conditions so valuable in their day should be revised and made to conform to modern commercial requirements, and at the same time made applicable to the whole of Canada.

It must be remembered that every contract of insurance which is so framed that the company is not fairly and properly protected from dishonest people, inevitably results in the loss being borne by the insured who are honest. If companies are compelled to pay unjust claims so as to avoid litigation, the means is always in their hands to recoup themselves by increasing their rates of insurance, and no legislation can possibly prevent them from so doing. During recent years in the Province of Ontario, a vigorous effort has been made to obtain certain amendments to the statutory conditions, but so far without avail. The movement had not been one coming from the insurance companies, who are in the business for profit, but from the purely mutual

companies, who have a practical monopoly of the non-commercial or non-mercantile hazards outside of cities and towns throughout that province. No feature of fire insurance is more interesting than the growth of what have been called the Farmers' Mutuals in the Province of Ontario. These are local institutions officered by the leading farmers from almost every county in the Province. The companies are eighty-three in number, and along with a few other mutual companies that undertake mercantile business, as well as farm risks, they carry over $230,000,000 of risks in this Province. These mutual companies have organized an association called The Mutual Fire Underwriters Association of Ontario, which assembles annually in the city of Toronto for the transaction of business affecting the general welfare. For a number of years a strong deputation from the association interviewed the Provincial Government, urging amendment to the statutory conditions, but in vain, and it is evident that in asking such legislation the Mutual Companies speak quite as strongly for the insured as the insurers, and this affords very cogent proof that the Ontario statutory conditions are not wholly satisfactory, but require revision and amendment.

Federal and provincial legislative jurisdiction.

The question has been raised whether the Parliament of Canada has jurisdiction to legislate respecting fire insurance contracts.

This necessitates a careful consideration of the decisions of the Privy Council since the passing of the B. N. A. Act. At first blush one might be inclined to think that the decision in the Citizens Ins. Co. *vs* Parsons, (5) was opposed to the contention that any such power exists, but a careful consideration of the case itself and the subsequent decisions of the Privy Council, where this case has been further considered, do not support that view, but on the contrary will, I venture to think, clearly

(5) 7 App. Cas., 96.

establish the jurisdiction of the Parliament of Canada to deal with this subject. In the Citizens Ins. Co. *vs* Parsons, the question for the Court to determine was the right of the Legislature of Ontario to adopt the Act to secure uniform conditions in policies of fire insurance, (39 Vict., cap. 24).

It was contended on behalf of the Federal power that the jurisdiction could be claimed under the 2nd. sub-sec. of sec. 91, namely, legislative authority over the regulation of trade and commerce, and secondly, under the general powers conferred by sec. 91 "to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects which this Act assigned exclusively to the Legislatures of the Provinces."

Lord Watson, in the case of Attorney-General for Ontario *vs* Attorney-General for the Dominion, (6) says that power to legislate under the authority of the general powers conferred by sec. 91 will not extend to any of the sub-sections of sec. 92. He makes use of the following language:

"But to those matters which are not specified among the enumerated subjects of legislation, the exception from sec. 92, which is enacted by the concluding words of sec. 91, has no application; and, in legislating with regard to such matters, the Dominion Parliament has no authority to encroach upon any class of subjects which is exclusively assigned to provincial legislatures by sec. 92. These enactments appear to their Lordships to indicate that the exercise of legislative power by the Parliament of Canada, in regard to all matters not enumerated in sec. 91, ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any of the classes of subjects enumerated in sec. 92."

In the case of Citizens *vs* Parsons it was finally held that legislation with respect to uniform conditions does fall within

(6) (1896), A. C., at p. 348.

the powers of the provincial legislatures by virtue of sub-sec. 13 of sec. 92, wherein powers to legislate exclusively are given to the Provinces in matters relating to property and civil rights in the province.

If, therefore, the only powers to legislate with respect to uniform conditions are to be found in the general power to legislate in all matters affecting the peace, order and good government of Canada, it would appear that by the conjoint effect of these two decisions, the Parliament of Canada would have no power to legislate upon this subject.

We have next to consider whether such legislation falls under the 2nd. sub-sec. of sec. 91, namely, the regulation of trade and commerce, because if it does, it is equally clear from the decision of the Privy Council in the case above mentioned, that, although the power to legislate with respect to this subject may be vested in the local legislature under its authority with respect to property and civil rights in the province, yet once the Parliament of Canada under its powers to regulate trade and commerce has exercised its authority by enacting legislation dealing with this subject, such legislation necessarily overrides the provincial legislation. Lord Watson put it this way in the above case:

"It has been frequently recognized by this Board, and it may now be regarded as settled law, that according to the scheme of the British North America Act the enactments of the Parliament of Canada, in so far as these are within its competency, must override provincial legislation."

This general statement that the legislation of the Parliament of Canada must override provincial legislation when they come in conflict, is abundantly established by the decisions both of the Supreme Court and the Privy Council.

In the case of The Citizens Ins. Co. *vs* Parsons in the Supreme Court, (7) Taschereau and Gwynne, JJ., who dissented, held the Parliament of Canada had and the Provincial legislatures

(7) 4 Can. S. C. R., 215.

had not power to enact laws regulating contracts of fire insurance.

The judgments of the majority of the Court, although they arrived at the same result in favour of the legislative jurisdiction of the Province, were not on some points entirely in harmony. It is, however, important to note that Chief Justice Ritchie and Mr. Justice Fournier agreed in holding that the legislation was *intra vires* because the Dominion Parliament, although having power to legislate on the same subject under sub-sec. 2 of sec. 91, yet not having so legislated, and the subject matter being also one affecting property and civil rights, and therefore within the jurisdiction of the Provincial legislature, the legislation was not *ultra vires*.

Chief Justice Ritchie makes use of the following words: p. 242.

"No one can dispute the general power of Parliament to legislate as to 'trade and commerce', and that where, over matters with which local legislatures have power to deal, local legislation conflicts with an Act passed by the Dominion Parliament in the exercise of any of the general powers confided to it, the legislation of the local must yield to the supremacy of the Dominion Parliament; in other words, that the provincial legislation in such a case must be subject to such regulations, for instance, as to trade and commerce of a commercial character, as the Dominion Parliament may prescribe."

Again he says, p. 243:

"I do not think the local legislatures are to be deprived of all power to deal with property and civil rights, because Parliament, in the plenary exercise of its powers to regulate trade and commerce, may possibly pass laws inconsistent with the exercise by the local legislatures of their powers, the exercise of the powers of the local legislatures being in such a case subject to such regulations as the Dominion may lawfully prescribe."

Similarly, Mr. Justice Fournier says, p. 258:

"In order to reconcile the exercise of these powers" (relating to trade and commerce on the one hand, and property and civil rights on the other), "I have arrived at the conclusion, in a case such as the one now under consideration, that the provincial jurisdiction is only limited by the exercise by the Federal Parliament of its power, in so far as the latter is competent to exercise it, and that the province can still exercise its power over that portion of the subject matter over which it has jurisdiction whenever this would not directly conflict with Federal legislation in a matter within Federal jurisdiction."

In the same case when in the Privy Council, Sir Montague Smith says: (8)

"Having taken this view of the present case it becomes unnecessary to consider the question how far the general power to make regulations of trade and commerce when competently exercised by the Dominion Parliament, might legally modify or affect property and civil rights in the provinces, or the legislative power of the provincial legislatures in relation to those subjects; questions of this kind, it may be observed, arose and were treated of by this Board in the cases of L'Union St. Jacques de Montréal *vs* Bélisle; Cushing *vs* Dupuy."

In Russell *vs* The Queen, (9) a case in which the validity of the Canadian Temperance Act, 1878, was in question, Sir Montague Smith, delivering the judgment of the Privy Council, says:

"The general scheme of the British North America Act with regard to the distribution of legislative powers, and the general scope and effect of secs. 91 and 92, and their relation to each other, were fully considered and commented on by this Board in the case of the Citizens Insurance Company *vs* Parsons. According to the principle of construction there pointed out, the first

(8) 7 App. Cas., 113.
(9) 7 App. Cas., 829.

question to be determined is, whether the Act now in question falls within any of the classes of subjects enumerated in sec. 92, and assigned exclusively to the Legislatures of the Provinces. If it does, then the further question would arise, viz.: whether the subject of the Act does not also fall within one of the enumerated classes of subjects in sec. 91, and so does not still belong to the Dominion Parliament."

In Hodge *vs* The Queen, (10) the Privy Council in considering the subject matter and legislative character of secs. 4 and 5 of the Liquor License Act, 1877, held that these were merely police or municipal regulations of a local character, and "as such they cannot be said to interfere with the general regulation of trade and commerce which belongs to the Dominion Parliament, and do not conflict with the provisions of the Canada Temperance Act, which does not appear to have as yet been locally adopted."

Again, in Tennant *vs* Union Bank of Canada, (11) Lord Watson in delivering the judgment of the Privy Council, says:

"The objection taken by the appellant to the provisions of the Bank Act would be unanswerable if it could be shown that by the Act of 1867 the Parliament of Canada is absolutely debarred from trenching to any extent upon the matters assigned to the provincial legislature by sec. 92. But sec. 91 expressly declares that 'notwithstanding anything in this Act,' the exclusive legislative authority of the Parliament of Canada shall extend to all matters coming within the enumerated classes; which plainly indicates that the legislation of that Parliament, so long as it strictly relates to these matters, is to be of paramount authority."

And again:

"But the argument, even if well founded, can afford no test

(10) 9 App. Cas., 117.
(11) (1894), A. C., 31.

of the legislative powers of the Parliament of Canada. These depend upon sec. 91, and the power to legislate conferred by that clause may be fully exercised, although with the effect of modifying civil rights in the Province."

Again, in the case of the Attorney-General for Ontario *vs* Attorney-General for Dominion, (12) in which the question arose as to the validity of R. S. O. (1887), cap. 124, sec. 9, affecting preferences to execution creditors, Lord Chancellor Herschel, says:

"Their Lordships do not doubt that it would be open to the Dominion Parliament to deal with such matters as part of a bankruptcy law, and the provincial legislature would doubtless be then precluded from interfering with this legislation inasmuch as such interference would affect the bankruptcy law of the Dominion Parliament. But it does not follow that such subjects, as might properly be treated as ancillary to such a law and therefore within the powers of the Dominion Parliament, are excluded from the legislative authority of the provincial legislature when there is no bankruptcy legislation of the Dominion Parliament in existence."

More recently the Privy Council said in the Grand Trunk Railway *vs* The Attorney-General of Canada: (13)

"But a comparison of two cases decided in the year 1894, viz., Attorney-General of Ontario *vs* Attorney-General of Canada (1894 A. C., 189), and Tennant *vs* Union Bank of Canada (1894 A. C., 31), seems to establish these two propositions: First, that there can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be *ultra vires,* if the field is clear; and, secondly, that if the field is not clear, and in such a domain the two legislations meet, then the Dominion legislation must prevail."

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(12) (1894), A. C., 189.
(13) (1907), A. C., p. 65.

These citations abundantly establish the proposition that if legislation with respect to uniform conditions of fire insurance contracts falls within the authority conferred upon the Dominion Parliament to pass laws for the regulation of trade and commerce, then upon such legislation being adopted it will supersede legislation on the same matter which has previously been adopted by the local legislature with full authority under its jurisdiction to legislate in matters affecting property and civil rights.

We have, therefore, only to consider now, what authority there may be for the contention that the regulations and conditions affecting contracts of insurance fall within the category of subjects relating to the regulation of trade and commerce exclusively assigned to the Federal Parliament. This matter was much considered in the Citizens Ins. Co. *vs* Parsons case, above cited, and the opinions of the Judges both of the Supreme Court and the Judicial Committee of the Privy Council in that case have an important bearing upon the question. Chief Justice Ritchie, after discussing at length the propositions as to whether or not an insurance company is a trading company, determines the liabilities of the parties without disposing of this point. He says:

"But in the view I take of this case, I am willing to assume that insurance companies may be considered trading companies, and yet, that it by no means follows that the legislation complained of is beyond the powers of the local legislatures."

Mr. Justice Strong delivered no formal judgment, but simply authorized the Chief Justice to state that he entirely agreed with the majority of the Court. Mr. Justice Fournier held that although insurance was a commercial transaction, yet the contract of insurance (which was the matter in question in the action), formed part of the civil law and therefore fell within the jurisdiction of the provinces, as coming under the head of "civil rights."

Mr. Justice Taschereau, after investigating the laws of other

countries, including Quebec, Prussia, Belgium, Portugal, Spain, Holland and Wurtemburg, came to the conclusion that the contract of insurance against fire was a commercial contract, and that "not a single authority had been cited at the Bar tending to show that there they are not considered as commercial companies, or that their operations are not considered as commercial operations."

Again he says:

"If the Federal Parliament has power to create insurance companies, it has the power to regulate them, that is to say, to prescribe the rules under which they can carry on their trade, by which their trade is to be governed."

Mr. Justice Gwynne on this point was in full accord with Mr. Justice Taschereau. He says:

"Contracts of fire insurance are governed by the same general principles as marine policies, and the solution of any question that may arise upon an insurance against fire will be found by a careful application of the doctrine of marine insurance; and the law most reasonably presumed originally that persons who entered into contracts respecting fire insurance were acquainted with, and had in their contemplation, the custom of merchants and legal rules affecting marine insurance, and intended that those new contracts should be construed and controlled by the same means. No reason therefore exists for regarding the business of marine insurance to be a trade and a branch of commerce, and that of fire insurance not to be."

It is true that the judgments of Mr. Justice Taschereau and Mr. Justice Gwynne are dissenting judgments of the Supreme Court, but they are entitled to as much weight as the opinions of the majority of the Court, because the judgment of the Privy Council expressly refused to determine the case on this ground. Sir Montague Smith in delivering the judgment of the Court, says:

"A question was raised which led to much discussion in the

Courts below and this bar, viz.: whether the business of insuring buildings against fire was a trade... Whether the business of fire insurance properly falls within the description of a 'trade' must, in their Lordships' view, depend upon the sense in which that word is used in the particular statute to be construed; but in the present case their Lordships do not find it necessary to rest their decisions on the narrow ground that the business of insurance is not a trade."

Lord Watson, however, in the case above cited, Attorney-General for Ontario *vs* Attorney-General for Canada, (14) has something to say upon the Citizens Ins. Co. *vs* Parsons, which has a very important bearing upon the matter under discussion. He says:

"The scope and effect of No. 2 of sec. 91 were discussed by this Board at some length in Citizens Insurance Co. *vs* Parsons, where it was decided that, in the absence of legislation upon the subject by the Canadian Parliament, the Legislature of Ontario had authority to impose conditions, as being matters of civil right, upon the business of fire insurance, which was admitted to be a trade, so long as those conditions only affected provincial trade."

It will be perceived from this that in Lord Watson's opinion it was only in absence of legislation by the Parliament of Canada, covering the same matter, that the local legislature had power to deal with contracts of insurance in the province.

It is not to be forgotten that the Parliament of Canada has dealt with the subject of insurance from the date of the very earliest exercise of its powers of legislation. There has been scarcely a session of Parliament in which some legislation on this subject has not taken place; and what is of very great importance to our inquiry, the Parliament of Canada, by the 27th and 28th sections of the Insurance Act of 1886, being 49 Vict., cap. 45, enacted two most important conditions which there-

(14). (1896), A. C., 348.

after should attach to life insurance contracts. These sections read as follows:

Sec. 27. "No condition, stipulation or proviso modifying or impairing the effect of any policy or certificate of life insurance issued after the first day of January, one thousand eight hundred and eighty-six, by any company doing business within Canada under the authority of the Parliament of Canada, shall be good or valid unless such condition, stipulation or proviso is set out in full on the face or back of the policy."

Sec. 28. "No policy or certificate shall contain or have endorsed upon it any condition providing that the said policy or certificate shall be voided by reason of any statement contained in the application therefor being untrue, unless such condition is limited to cases in which such statement is material to the contract."

These clauses have never yet been held *ultra vires* of the Dominion Parliament.

No stipulations more far-reaching, or interfering more seriously with the civil rights of the parties in matters of contract can well be conceived. If the Parliament of Canada had authority to deal in this way with contracts of life insurance, it is difficult to suggest any good reason why the same legislative authority does not exist with respect to contracts of fire insurance. (14a)

The result of this review of the cases leads to the following conclusions:

1. Both the Parliament of Canada and the Provincial Legislatures have authority to legislate respecting contracts of fire insurance, the former as dealing with matters of trade and commerce, the latter as affecting property and civil rights.

2. In the absence of Federal legislation, Provincial legislation on the subject is *intra vires* and binding upon all insurance corporations carrying on business within the Province.

3. Upon the Federal government legislating on the subject

(14a) Vide also Regina *vs* Holland, 7 B. C. Rep., 281.

for the whole Dominion, such legislation will supersede the Provincial legislation when they come in conflict. (15)

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(15) In the year 1899 the writer at the instance of the present Chief Justice of Canada who at that time was Solicitor General, held a number of conferences with the managers of the leading stock and mutual fire insurance companies doing business in Canada and also had considerable correspondence and finally a personal interview with Mr. Elijah R. Kennedy, the Chairman of the Committee that prepared the New York Standard Policy which has since been introduced by statutory enactment into the leading States of the Union. As a result of the information so obtained the writer drafted a Fire Insurance Policy Act which will be found in the appendix infra, p. 537, and which was introduced in the House of Commons by the Solicitor General in 1900, but the bill was not proceeded with. It will be perceived that to avoid any question of *ultra vires*, the Act is not made applicable to companies incorporated by the Legislature of any of the Provinces of Canada although the writer is of opinion as above stated that there was jurisdiction to make it applicable to all fire insurance companies doing business in Canada. From the writer's former connection with the Ontario Mutual Companies, having acted as the solicitor for their associaton for some years, he is able, he thinks, to express the opinion of these companies, that an Act such as this would be of even greater benefit to the Mutual than to the Stock Companies.

CHAPTER II

THE CONTRACT

Definition. — Civil Code Quebec. — Interim Receipt. — Seal. — Completion of Contract. — Delivery of Policy. — Ultra Vires.—Divisibility.—Term of Policy.—Premium payable in cash.—Insured property.—Locality.—Loss and damage.

Insurance has been defined as a contract whereby, for a stipulated consideration, one party undertakes to indemnify the other against damage or loss on a certain subject by certain perils. (1)

The Civil Code of the Province of Quebec defines Insurance as follows: "Insurance is a contract whereby one party, called the insurer or underwriter, undertakes for a valuable consideration to indemnify the other, called the insured, or his representatives, against loss or liability from certain risks or perils to which the object of the insurance may be exposed, or from the happening of a certain event." (2)

Fire insurance may be defined as **a contract whereby one party undertakes for a consideration to indemnify another party, to the amount stipulated in the contract, for his loss or damage by fire to the property insured.**

The contract is one of indemnity and indemnity only.

The principle is thus expressed by Lord Justice Cotton, in Castellain *vs* Preston: (3)

(1) This is the definition given in Phillips, on Insurance, an authority frequently commended in the highest terms. Vide Lord Justice Blackburn in Aitchison *vs* Lohre, 4 App. Cas., at p. 763.

(2) Vide art. 2468 C. C. Quebec.

(3) 11 Q. B. D., 380, at p. 393.

"The policy is really a contract to indemnify the person insured for the loss which he has sustained in consequence of the peril insured against which has happened, and from that it follows, of course, that as it is only a contract of indemnity, it is only to pay that loss which the assured may have sustained by reason of the fire which has occurred. In order to ascertain what that loss is, everything must be taken into account which is received by and comes to the hand of the assured, and which diminishes that loss. It is only the amount of the loss, when it is considered as a contract of indemnity, which is to be paid after taking it into account and estimating those benefits or sums of money which the assured may have received in diminution of the loss."

POLICY DEFINED.

The contents of a policy of insurance is well expressed in art. 2569 of the Civil Code, as follows:

"A fire policy contains the name of the party in whose favour it is made;

"A description or sufficient designation of the object of the insurance and of the nature of the interest of the insured;

"A declaration of the amount covered by the insurance, of the amount or rate of the premium, and of the nature, commencement and duration of the risk;

"The subscription of the insurer with its date;

"Such other announcements and conditions as the parties may lawfully agree upon."

ORAL CONTRACT.

In Ontario, the statute (4) provides that "contract shall mean and include any contract or agreement sealed, written or oral, the subject matter of which is within the intent of the clause numbered 41 of this section", and ss. 41 contains a definition of

(4) R. S. O. (1897), c. 203, s. 2, ss. 37.

insurance which includes insurance against loss or damage by fire.

The entry of the application and acceptance of the risk by the clerk of the insurance agent, was held sufficient to make a valid contract, where the agent had power to receive proposals for insurance, to fix rates of premium, to receive monies, to countersign, issue and renew and consent to the transfer of policies, subject to the rules and regulations of the company, and such instructions as might from time to time be given to its officers. (5)

Under instructions from the plaintiffs to obtain from them an insurance against loss by accidental leakage from their sprinkler system of fire protection, an insurance broker was informed by the accountant in charge of the head office that such insurance covered frost damage, which he thereupon applied for. The rate was subsequently fixed, no mention being made, as was the fact, of there being an extra rate to cover frost damage. The interim receipt only insured the plaintiffs against accidental leakage. It was held that the plaintiffs were entitled to recover on a verbal contract. (6)

In Quebec, art. 2481 of the Civil Code is as follows: "The acceptance of an application for insurance constitutes a valid agreement to insure, unless the insurer is required by law to contract in another form exclusively."

Before the Code it was questioned whether a verbal contract of insurance against fire was good by the law of Quebec. (7)

It was also held that an insurance by simple receipt for the premium was legal and binding without the issue of a policy. (8)

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(5) Canada Fire & Marine Ins. Co. *vs* Western Ass. Co., 26 Gr., 264.

(6) Hawthorne *vs* Canadian Casualty, etc., Ins. Co., 14 O. L. R., 166; 39 Can. S. C. R., 558.

(7) Montreal Ins. Co. *vs* McGillivray, 13 Moo. P. C., 87.

(8) O'Connor *vs* Imperial Ins. Co., 14 L. C. J., 219.

INTERIM RECEIPT.

The receipt given the applicant evidencing his application and binding the company for a short date insurance, is called in Canada an interim receipt.

As was pointed out by Chief Justice Wilson, (9) the word "receipt" is somewhat of a misnomer, as the document not only acknowledges the receipt of the money but expresses the contract between the parties. In that case the judge said: "The interim receipt, as it is called, is not very accurately described by that name. It may be interim as regards a contract being subsequently to be made by the company, that is, it may be a mere acknowledgment of the receipt of so much money while the application or proposal is under consideration, without being a contract in any form. Or it may be interim as regards some stipulations which are usually contained in it in this country and the United States; that is, it may be a present and actual insurance to the applicant while his proposal is under consideration. In that case the term **receipt** very inadequately and erroneously describes such an instrument which is to all intents and purposes a veritable contract."

The interim receipts have the name of the manager or general agent, stamped or lithographed thereon, which after reciting the application for insurance proceed to say that pending the acceptance or refusal of the proposal, the property is held insured by the company. The legal effect of this instrument is thus defined by the Judicial Committee of the Privy Council, Queen Ins. Co. *vs* Parsons: (10)

"This note is not a policy of insurance in the common understanding of that word.. .. .. It is expressly a contract with a view to a policy making interim provision until a policy is prepared and delivered. It contains a proposal for insurance which, if accepted by the company, would result in a policy to

(9) McQueen *vs* Phœnix Mutual, 29 U. C. C. P., p. 520.
(10) 7 App. Cas., p. 124.

be based on the terms of the proposal and issued by the company."

SEAL.

The strict rule requiring that the seal should be affixed to all contracts of insurance corporations to make them binding which at first prevailed, has long since been relaxed. (11)

The act of incorporation of the defendant Insurance Companies required the contracts to be under seal and signed and countersigned as the acts directed. The policies in question were not under seal, but they were signed and countersigned as required, and the action was defended on this ground.

In giving judgment, Moss, C. J., said: "It is an utter fallacy to suppose that the statute incorporating the Company expressly prohibited the making of a contract except under seal. It does indeed declare that the policy signed in a particular way and sealed, shall be valid, but it does not restrict the Company from binding itself according to the ordinary rules of law." And he cites cases in the Canadian and English Courts to support that view.

Patterson, J., in the same case, cites the judgment of Chief Justice Bovill as showing the gradual modification of the law with respect to the power of corporations to bind themselves, and that now the rule is established that they may do so without a seal. He points out that that view had been at any early date adopted in the Courts of the United States and Canada.

In another case, (12) Patterson, J. A., in citing the Company's act of incorporation which provided that "All policies or contracts of insurance shall be signed by the president, etc., and being so signed, etc., shall be valid", said "this did not imply that the plaintiffs could not be bound in any other way and that

(11) Montreal Ass. Co. *vs* McGillivray, 13 Moo. P. C., 87. Wright *vs* Sun Mutual, 29 U. C. C. P., 221.

(12) Canada Fire and Marine *vs* The Western Assurance Co., 26 Gr., 264, 5 A. R., 244.

under the general law of this province which in the absence of evidence to the contrary we must take to prevail also in Montreal, a trading corporation may become bound in respect of those matters of business which it is incorporated to carry on, by almost any act which will bind an unincorporated partnership." Again he says: "The doctrine may therefore be considered to be well established in this country that the acceptance of a written proposal for insurance consummates a bargain provided the offer is standing at the time of the acceptance."

Where the policy requires to be countersigned by the agent, non-compliance with this condition if the result of neglect, mistake or inadvertance will not avoid the policy.

A policy of insurance provided that it should not take effect unless countersigned by the agent. The latter received the premium and issued the policy, but neglected to countersign it.

It was held, that the countersigning of the policy had been waived. (13)

Although treated as a case of waiver, the reasoning upon which the judgment is supported is estoppel, the court holding that it would be "a fraud on the insured and an entire defeating of justice if an underwriter could take advantage of the omission of his agent to countersign the policy (by an oversight probably), when the agent had received the premium and delivered the policy to the person applying for insurance."

CONTRACT COMPLETED.

A contract of insurance is completed where the policy is signed and sealed without delivery, and its retention by the company is not for the purpose of keeping it in escrow until the happening of some event, (14) but **where the company has executed the policy untruly believing the premium has been**

(13) Chapman *vs* Delaware Mutual Ins. Co., 23 N. B. Rep., 121.

(14) Xenos *vs* Wickham, L. R., 2 H. L., 296; Roberts *vs* Security Co., 1897, 1 Q. B., 111.

paid, or with the condition endorsed on the policy that it shall not take effect until the premium is paid, the company is not bound. (15)

The initialing of an application for insurance by officers of an insurance company, though indicating acceptance of the risk, does not without communication of the fact to the applicant constitute any contract with him. (16)

A contract of life insurance is complete on delivery of the policy to the insured and payment of the first premium. Where the insured being able to read, has had ample opportunity to examine the policy, and not being misled by the company as to its terms, or induced not to read it, had neglected to do so, he cannot, after paying the premium, be heard to say that it did not contain the terms of the contract agreed upon. (17)

A policy contained a stipulation that it should be valid only when countersigned by the duly authorized agent of the company. Held, that defendants were not bound by a policy signed by the general-manager and countersigned in the name of one who had been their agent, by one of his clerks, but without any authorization by him, even though the insured may not have known of the cessation of the agency. (18)

On February 24th, 1900, plaintiff's husband applied to the defendant company for insurance on his life; the application containing this stipulation: "The policy asked for, if issued, will only come into force when the first premium has been actually paid to the company and accepted while the applicant for insurance is alive and in good health." When making the application the applicant paid $4 on account of the first premium, and the medical examination having been satisfactory the company

(15) Western Ass. Co. *vs* Provincial Ins. Co., 5 A. R., 190; Calhoun *vs* Union Mutual Ins. Co., 19 N. B. Rep., 13.

(16) Armstrong *vs* Provident Savings Life Ass. Soc., 2 O. L. R., 771.

(17) Provident Savings Life Association of New York *vs* Mowat, 32 Can. S. C. R., 147, reversing 27 A. R., 675.

(18) Walkerville Match Co. *vs* Scottish Union Co., 40 C. L. J., 28.

issued the policy at New York, on March 8th, 1900, and mailed it on the 9th March to its agent at Montreal, who received it in the daytime on Saturday, March 10th. On March 8th, the applicant was attacked with congestion of the lungs, from which he died on March 10th, between 9.30 and 10 o'clock a. m. The plaintiff afterwards tendered the balance of the premium to the agent, who refused to deliver up the policy.

Held, that if in principle, the acceptance of the application constitutes a valid contract of insurance (art. 2481 C. C. supra) in this case, such acceptance was made subject to the above condition, and that not having been complied with no contract for insurance existed. Held, also, that in view of the said condition the deposit of the policy in the post office at New York did not constitute a delivery of it to the assured. (19)

A policy of insurance, issued in New York and delivered in Boston to a broker, by whom it was sent to St. John, to his agent, and by him handed to the defendants, who gave in return a premium note, was held not to have been complete until actually delivered and the transaction was illegal under Act of Assembly, 19 Vict., cap. 45, which prohibits any foreign insurance company from doing business in the province without first filing a certificate in the Provincial Secretary's office. (20)

A. held himself out as the agent in St. John of the Columbia Insurance Co., whose head office was in New York. His course of business was to receive applications for insurance addressed to the company, which he would forward to B., an insurance broker in Boston. The latter would send the application to the company, when, if it was accepted, a policy would be delivered to him, and the premium charged against him at the time. The policy was then forwarded by B. to A., who would deliver it to the assured, taking the premium note direct to himself, and sending to B. his own note for nine-tenths of the amount (the balance being kept for commissions). Held, that

(19) Girard *vs* Metropolitan Life Ins. Co., Q. R., 20 S. C., 532.

(20) Allison *vs* Robinson, 2 Pug., 103.

this was an indirect carrying on of insurance business in this province by the company, contrary to the Act of Assembly, 19 Vict., cap. 45, and that a premium note given to A. could not be collected; and also that the fact of the note being made to A. instead of to the company, in no way distinguished this case from Allison *v.* Robinson. (21)

A company incorporated under the authority of a provincial legislature may carry on the business of fire insurance and is capable of entering into a valid contract of insurance relating to property outside the province. (22)

CONTRACT DEPENDING ON CORRESPONDENCE.

On February 7th, plaintiff wrote W. describing him as agent of the North British and Mercantile Insurance Company, and referring to a statement of W's that the company would be willing to insure the buildings at the same rate for which they had been insured in the Agricultural company, requested him to effect insurance on them for $10,000 in favour of one L. a mortgagee; that it was the same risk which the Canada Agricultural Ins. Co. had for three years at two per cent., and that the policy was in the hands of L., from whom J. could get it to draw the new policy. He also stated that he would like to have a similar amount insured on the buildings in his own favour, at the same rate; and he referred to a plan of the town of Chatham for position of the buildings, where they were marked as the "Convent" and the "Cathedral". On the same day W. wrote J. as follows: "Enclosed find the Bishop's (plaintiff) application just received 6.30 p.m. He has misunderstood me as to rate. I told him, as authorized by S., at the rate of one per cent., which would be about fair. If the 'North British' and the 'Western' will do it, and plan is sufficient, telegraph me in the morning. The meaning of application is $5,000 on each of the blocks

(21) Jones *vs* Taylor, *Re* Oulton, 2 Pug., 391.

(22) Canadian Pacific Ry. Co. *vs* Ottawa Fire Ins. Co., 39 Can. S. C. R., 405.

—that is $10,000 in favour of L. to secure mortgage, and an additional $10,000—five thousand on each in favour of the Bishop (plaintiff)." On the next day, the 8th, J. telegraphed to W. as follows: "S. and I take ten thousand each."

Held, that this constituted no completed contract of insurance. (23)

CONTRACTS DEEMED TO BE MADE IN ONTARIO.

The Ontario Insurance Act (24) contains the following provision:

143. "Where the subject matter of any insurance contract is property, or an insurable interest within the jurisdiction of Ontario, or is a person domiciled or resident therein, any policy, certificate, interim receipt or renewal receipt, or writing evidencing the contract, shall, if signed, countersigned, issued or delivered over in Ontario, or committed to the post office or to any carrier, messenger or agent, to be delivered or handed over to the assured, his assign or agent in Ontario, be deemed to evidence a contract made therein, and the contract shall be construed according to the law thereof, and all moneys payable under the contract shall be paid at the office of the chief officer or agent in Ontario of the insuring corporation, in lawful money of Canada, and this section shall have effect notwithstanding any agreement, condition or stipulation to the contrary."

The insured residing in Ontario applied through an insurance broker in Montreal for an insurance policy on property in Ontario in the defendant company, which was incorporated under the laws of one of the United States, and had its home office in that State. The evidence of the insured was that he received the policy through the mail from the broker — the evidence of the company was that it was delivered to the broker as the assured's agent and who was not an agent of the company which had no agent or officer in Ontario. No place of payment was

(23) Bishop of Chatham *vs* Western Ass. Co., 22 N. B. Rep., 242.

(24) R. S. O. (1897), cap. 203.—Quebec provision, *vide* infra Cap. X.

named in the policy. Held, that the plaintiffs had not proved a cause of action upon which they were entitled to sue the company in Ontario; and that in the provision as to committing a policy to the post office the words "to be delivered or handed over to the assured, his assign or agent in Ontario" in sec. 143 of cap. 203 R. S. O., 1897, contemplates a committing to the post office of the policy by the insurer addressed to the insured, his assign or agent in Ontario; and the provision, therein, that in such event the money should be payable at the office... in Ontario, shews that the section, was intended to apply to companies having an office or agent in Ontario and not to a company which has in no way brought itself or its business within the limits of the province. Held, also, that the company, not having complied with the Insurance Act, R. S. O., 1897, cap. 203, in regard to license of registration, it was precluded by sec. 85 of that Act from entering into any contract with anyone in Ontario. (25)

Delivery of policy.

Where the policy, duly executed, is mailed to the insured, the contract of insurance arises, as in other cases, from the time of delivery to the post office, but questions arise where the policy, instead of being sent direct, is forwarded to the local agent or broker through whom the insurance has been effected.

It was held in New Brunswick, (26) where an application was made to a broker for insurance, that the risk began when the company received the premium and put the policy in motion to be sent to the broker.

Where, however, the application for insurance was made to the local agent of the company, it was held in the Supreme Court of Canada, (27) that inasmuch as the policy on its

(25) Burson *vs* German Union Ins. Co., 10 O. L. R., 238, Teetzel, J.

(26) Per Ritchie, J., in McLachlan *vs* Ætna Ins. Co., 4 All., 173.

(27) Confederation Life Ass. *vs* O'Donnell, 10 Can. S. C. R., 92; 13 Can. S. C. R., 218; S. C. Cas., 154.

face provided that it should not be valid unless countersigned by the local agent, until so countersigned the document was an escrow and the company was not bound.

Where the application was made to a firm of brokers for a policy of marine insurance, and they forwarded it to the local agent of the company, who sent it forward to the head office, and where the policy issued thereon was sent to the local agent, but its delivery stopped by telegram, it was held that the property in the policy never passed out of the company and it was at the most only an escrow in the hands of the agent. (29)

It is to be noticed, however, in this last case that the decision is complicated to some extent by reason of the fact that the court also held that the policy issued never was the policy asked for by the applicant, and the company was, therefore, relieved from liability.

A life policy contained a condition that the policy should be void if, without the permission of the company, the insured engaged in employment on a railroad. The policy was dated 27th September 1894, and by its terms insured the deceased for one year from the 5th October following, and the renewal receipts continued the insurance for 12 months from the 5th October in each year. It was held, following Xenos *vs* Wickham, supra p. 22, that the policy took effect from the 27th September, and not from the 5th October, the date of its delivery to the deceased in British Columbia. (30)

CONTRACT ULTRA VIRES.

A contract of insurance alleged to have been made in Montreal by an agent there of an insurance company of New York, whose charter and by-laws provide that it can only contract in New York, and by its president or vice-president, is null and void. And the statements or admissions of an agent, made after the contract has been performed, are inadmissable as evidence. (31)

(29) Buck *vs* Knowlton, 21 Can. S. C. R., 371.

(30) Elson *vs* North American Life, 9 B. C. Rep., 474. Affirmed in the Supreme Court, 33 Can. S. C. R., 383.

(31) Redpath *vs* Sun Mutual Ins. Co., S. C., 1869, 14 L. C. J., 90.

THE CONTRACT OF INSURANCE IS INDIVISIBLE.

Where a policy of insurance covered both buildings and stock and the application stated that there were no incumbrances, although there were several mortgages, it was held that the policy was entire and indivisible and that the misrepresentations as to incumbrances rendered the policy wholly void. (32)

It will be observed, however, that the statutory conditions (infra, p. 362), now expressly provide that the misrepresentation shall only void the policy with respect to the property in regard to which the misrepresentation is made.

In Quebec, it was held, that where several subjects are covered by one contract of insurance the contract is indivisible, and where the insured incurs a forfeiture as to one subject, the policy is wholly void. (33)

But in another case, (34) it was held, that one policy can cover several distinct insurances, and in that case one of these insurances might be affected by causes not affecting the other insurances.

TERM OF POLICY.

Where the insurance runs from one day named in the policy to another day named therein, "both inclusive", the contract does not expire until midnight on the last day. This rule could only be rebutted by evidence of a clearly established and invariable custom to the contrary, which, in the present case, was not shown to exist. (35)

PREMIUM.

Closely connected with the inquiry regarding the date at

(32) Samo *vs* Gore District Mutual Ins. Co., 2 Can. S. C. R., 411.

(33) Mackay *vs* Glasgow & London Ins. Co., 1888, M. L. R., 4 S. C., 124.

(34) Richmond Fire Ins. Co. *vs* Fee, Q. B., 1888, 14 Q. L. R., 293.

(35) Herald Co. *vs* Northern Assurance Co., 1888, M. L. R., 4 S. C., 254.

which the policy goes into effect, is the question as to how far the payment of the premium is a condition precedent to the liability of the company.

Although an acknowledgment of the receipt of money in a deed is not conclusive evidence between the parties of the facts so stated, so as to prevent an action being brought to recover the consideration, nevertheless, in certain cases, where the payment of money is a condition precedent to the existence of the contract, it has been held that the party making the acknowledgment cannot defeat the operation of the contract by proving that the money so admitted to have been paid was not paid. (36)

The non-payment of the premium may be considered under four heads:

1. In the case of an interim receipt;

2. Where the policy contains a condition that the payment of the premium in cash is a condition precedent to the company's liability;

3. Where the policy contains no condition or provision which requires that the premium should be paid in cash but acknowledges the payment; and

4. Where the policy contains no condition or provision which requires that the premium should be paid in cash and there is no acknowledgement of its payment.

Firstly. — Interim receipt cases.—In the case of an interim receipt, the rule is that, it is not within the scope of an agent's ostensible authority to take a promissory note or other security in lieu of cash, and that, the company is not liable upon the interim contract where the premium has not been paid in cash.

This statement is based upon the following decisions:

The agent of a Fire Ins. Co. had authority to take notes for premiums instead of cash in certain cases, and blank forms for the purpose were placed in his hands by the company. The

(36) Roberts *vs* Security Co., 1897, 1 Q. B., 111.

plaintiff was non-suited by Patterson, J., at the trial on the ground that to create a valid insurance the premium must be paid in cash. This judgment of non-suit was set aside on the ground that there was no evidence to show that the agent was exceeding his instructions in taking notes for cash in the case before the Court. A new trial having been ordered, the action was heard by Burton, J. A., when the plaintiff was again non-suited. Upon a motion for a new trial before the same Court of Common Pleas, it was said : "We are hardly prepared to hold that on the evidence before us the defendants are necessarily bound by the unauthorized act of their local agent in taking anything but cash for the premium on this risk. Every man may be naturally supposed to know that for an ordinary insurance on a mercantile stock he must pay the premium in cash. Such is the general rule. He may know that on a mutual risk a premium note is given.

"It also appears that, on what are called 'farm risks', notes are taken. But when he takes a receipt as for so much cash, contrary, as he knows, to the truth, as he paid no cash, we may with reason hold that the plaintiff must take the risk of the agent having authority to give him credit on his note." (37)

The owners of a quantity of wheat on board a vessel applied to the agent of an insurance company to insure the same, who took the risk subject to the approval of the head office. The insurance was authorized and the agent directed to remit the amount of the premium at once. A clerk in the agent's office left the receipt at the insured's office and demanded the premium, but owing to absence of the accountant he was told to call again. The owners of the wheat, instead of paying the premium, credited the amount to the agent in their books, and before any policy was delivered, information was received of the loss of the vessel and cargo, which had in fact occurred before the policy for insurance was made. The Company then refused to issue a policy and a bill was filed to compel them to do so, or pay the amount of loss.

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(37) Johnson *vs* Provincial Ins. Co., 26 U. C. C. P., 113.

In delivering the judgment in the Court of Appeal, Sir J. B. Robinson said:—"The evidence did not establish that the agent of the company had agreed to dispense with the actual payment of the premium as necessary to complete the contract; although it is true that he signed a receipt and left it at the house of business of the plaintiffs, without actually getting the money. It seems clear that he left it, relying on the money being promptly remitted. Under such circumstances it would not be more reasonable to hold the contract complete through the receipt alone, than to contend that a tradesman's bill was paid, because he ventured to send a receipt by the servant who took home the goods, which receipt, in a moment of dangerous confidence, the servant left behind him, without actually getting the money.

"In such a case the receipt could only be looked upon as an acknowledgment in abeyance — like a deed delivered as an escrow.

"But if the agent had consented to wait for the money a certain time, or to charge it in account with the insurer, upon the understanding that he would pay his premiums periodically, or that the charge should stand as an item of general account either between himself and the assured, or between the company and the assured, the company would not be bound by any such course of dealing of their agent, unless it could be shewn that he was authorized by the company to bind them by insurances effected in that manner." (38)

The local agent of a fire insurance company was authorized to effect interim insurances by issuing receipts countersigned by him on the payment of the premiums in cash. He employed a canvasser to solicit insurances, who pretended to effect an insurance on behalf of the company by issuing an interim receipt which he countersigned as agent for the company, taking a promissory note payable in three months to his own order for the amount of the premium."

(38) Walker *vs* Provincial Ins. Co., 7 Gr., 137; affirmed on appeal, 8 Gr., 217.

In giving judgment, Strong, J., said:—"The powers of the sub-agent cannot exceed those of the principal agent. Smith, the local agent, himself, had no power to enter into a contract in the terms of that which Healy pretended to make as his sub-agent with d'Amour and Charlebois. He could only effect an interim insurance binding on the company by an interim receipt countersigned by himself and on receiving himself the premium in cash. London and Lancashire Life Insurance Co. *vs* Fleming (1897) A. C. 499; Acey *vs* Fernie, 7 M. & W. 151. These terms were not complied with and, therefore, on this last distinct ground, that on which Mr. Justice Hall's dissenting judgment proceeds, the respondent must fail." (39)

The defendants executed policies acknowledging the receipt of premiums for re-insurances, which their agent at St. John had accepted and sent them to him for delivery, but refused to deliver them when they found the premiums had never been paid, the fact being that the agents, by verbal arrangement, without the knowledge of the principals were accustomed to give credit to each other for premiums, and to settle at the end of the month. Burton, J. A., says: "There was no authority in fact conferred upon the local agent to accept insurances except by the issue of an interim receipt upon the payment of the premium, and although the policy acknowledged the receipt of the the premium, the Company was not bound by that admission, but it was manifest upon the face of the policy that it was not intended to be a binding instrument until the payment of the premium."

Galt, J., says, 196: "The local agents have no authority whatever, I mean as respects these defendants, to do more than receive applications on the form furnished by the Company, and grant interim receipts upon receipt of the premium." (40)

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(39) Canadian Fire Ins. Co. *vs* Robinson, 31 Can. S. C. R., 488.

(40) Western Assurance Co. *vs* Provincial Ass. Co., 5 A. R., 190.

Secondly. — Where the policy contains a condition that the payment of premium in cash is a condition precedent to the company's liability, a provision of this sort is binding upon the assured.

A declaration upon a policy after the Fire Insurance Policy Act which contained no statutory conditions, but had a condition that no insurance, whether original or continued, shall be considered as binding until the actual payment of the premium and declared general performance of conditions entitling plaintiff to recover, defendant pleaded amongst other things that premium had not been paid, and by virtue of above condition defendants not liable. The trial judge held that the policy was one without conditions and amended pleadings setting up execution of policy under seal which acknowledged payment of premium and alleging an unconditional covenant to indemnify, etc., and the plea was amended to read as averring simply that the policy contained a provision that no insurance should be binding until the actual payment of premium. (41)

Gwynne, J., held that effect of the statutory conditions was 1st, to make the contract one having the statutory conditions only, and that the condition as to the effect of non payment of premium was not a variation from the statutory condition, "for the matter relied upon, as a defence under this condition, or agreement as it may more properly be called, goes to the foundation of the contract, and denies that it ever came into existence so as to create any liability in the defendants for default of the plaintiff to pay his premium, payment of which is the sole consideration for a contract of indemnity against loss."

Wilson, C. J., said: "The condition which provides that no insurance shall be considered to be binding until the actual payment of the premium, is not governed by the statute relating to insurance statutory conditions or variations. That Act relates to contracts of insurance which have been made. The above stipulation refers to a precedent act to be done, without which there is to be no contract.

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(41) Geraldi *vs* Provincial Ins. Co., 29 U. C. C. P., 321.

"It is of no consequence where that condition or stipulation is put. Whether on the face or on the back of the policy, or whether it is upon it or not, or in writing or not, it is equally binding, and there is no contract completed until the terms of the condition have been complied with, or waived or rescinded."

A premium note, dated the 24th May, 1880, given on effecting an insurance with the defendant company, stated that the insured for value received on policy No. 1, 405, dated the 6th May 1880, promised to pay the company $14.50 on the 24th December 1880, with interest at seven per cent. and contained an agreement that if the note were not paid at maturity, the whole amount of the premium should be considered as earned, and the policy should be null and void so long as the note remained unpaid. Upon the policy which was dated the 14th May, 1880, and took effect from the 24th May, 1880, was indorsed a variation condition that the policy should not be valid or binding until the premium was actually paid, unless credit was given for it; and in that case it was a condition of the contract "that if such premium be not paid, the whole amount of premium shall then be considered as earned, and the policy shall be null and void, so long as any part thereof remains unpaid." Held, that the condition was not unreasonable, being in effect the same as that provided for in the case of mutual insurance companies by R. S. O. 1877, c. 161. (42)

A condition in a policy of life insurance provided that if any premium, or note, etc., given therefor, was not paid when due, the policy should be void.

The policy of insurance upon the life of Robert McGeachie was issued by the defendants on the 6th day of December, 1889, and he died on the 6th day of November following (1890). The amount of the insurance premium was $31.10 annually. This amount was not paid to the defendants in cash upon the issuing of their policy, but by agreement with the plaintiff the defendants accepted instead the promissory note of Robert McGeachie

(42) Sears *vs* Agricultural Ins. Co., 32 U. C. C. P., 585.

at six months, for $31.10, with interest thereon at seven per cent. per annum. This note became due on the 7th day of June, 1890. It was not then paid by the maker, but by agreement between him and the defendants, a renewal note was taken instead, at thirty days, for the amount of the first note with interest added, $32.20, the second note itself bearing interest also at the rate of seven per cent. per annum.

At the maturity of the second note (10th July 1890), $10 cash was paid by Robert McGeachie upon account and a third note at two months given for the balance ($22.40), this third note also bearing interest at seven per cent. per annum.

The third note fell due on the 13th September 1890, when it was renewed at one month, by a fourth note, in which the interest was added to the previous amount thus making $22.80.

This fourth note became due on the 16th October, 1890, and remained in defendants' possession overdue and unpaid up to the death of Robert McGeachie, three weeks after the maturity of the note.

The acceptance of the note in the first place, and of the different renewal notes, was in each case a matter of arrangement and agreement between the parties. During the currency of the second note Robert McGeachie wrote (2nd July, 1890) to the defendants, asking to have the policy cancelled, but was answered that such a request was unreasonable and could not be entertained.

After maturity of the last note defendants, on 5th November, 1890, wrote the maker demanding payment of it.

This letter reached St. Catharines on the day on which Robert McGeachie died and was delivered to his brother on the same day. The local agent of the company was at once communicated with and asked if he would accept the money, but refused to do so. On the following Monday, four days later, the amount was formally tendered to the defendants at their head office but was refused.

Held, affirming the decision of the Court of Appeal, that where a note given for a premium under said policy was partly

paid when due and renewed, and the renewal was overdue and unpaid at the death of the assured, the policy was void.

Held, further, that a demand for payment after the maturity of the renewal was not a waiver of the breach of the condition so as to keep the policy in force. (43)

One of the conditions indorsed on a policy was that it was not to take effect unless the premium was paid prior to any accident on account of which the claim should be made.

Another was that no renewal receipt should be valid unless printed in office form and signed by the managing director and countersigned by the agent.

Nothing was stated in the policy or conditions respecting the payment of premiums, whether in cash or by premium notes, and therefore, nothing as to the effect of non-payment of premium notes at maturity.

Prior to November 1889, the company was in the habit of taking premium notes, but at that time they informed their agents by circular that they had resolved to discontinue the practice, and directed them to conduct the business thereafter on the cash system, and refused to accept notes for premiums for accident insurance.

One Paton was at the period in question agent and manager of the company for the Maritime Provinces. He was also agent for the Manufacturers Life Insurance Company, a company having, substantially the same management. In the business of this latter company premium notes were continued to be taken, and the circular referred to pointed to a distinction intended to be made in the mode of conducting the accident and life business.

The jury found that a sum of money was paid in cash, and that the note was given and taken as payment of the balance of the premium.

The note never was paid, nor was it delivered up to plaintiff, but remained in possession of Mr. Paton. The company knew nothing of it.

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(43) McGeachie *vs* North American Life Ins. Co., 23 Can. S. C. R., 148.

Upon the findings as above, judgment was entered for the plaintiff by the Chief Justice of Nova Scotia, before whom the case was tried, and the judgment was afterwards sustained by the other judges with exception of Meagher, J., who dissented.

In its judgment the Supreme Court said:—"The contention of the appellants is that Paton did not purport to bind the company (or in other words to renew the insurance) and that, if he did, he acted without authority; and further that if there was any proper evidence of such authority it should have been passed upon by the jury.

"The question therefore is whether it was within the scope of Paton's employment to take a premium note as in payment.

"His authority to receive premiums and to give renewal receipts, and so to complete the contract is clear. He says that every renewal receipt comes to him from the head office at Toronto, and that he renews policies after they have lapsed by giving renewal receipts.

"The authority of a general agent is, however, restricted to the range of his employment and to the acts and representations which a prudent and ordinarily sagacious and experienced person (with no reason to suspect otherwise) might expect him to do or to be authorized to make in respect of the particular business entrusted to him.

"It would not be expected that an insurance agent would be authorized to receive a chattel in payment of a premium, or to discharge his own indebtedness to the assured through it, for this would be travelling out of the usual course of business.

"But there is nothing in the course of business (or in the nature of the contract) to make it unreasonable to take a note.

"In marine insurance it is very common. In the case of the Manufacturers Life it is shown to be the practice; and the evidence further shows that it was the practice of the appellant company to take premium notes up to November 1889.

"In the United States it has been held that where the agent is authorized to accept the payment of premiums he may, in his discretion, accept a note or cheque instead of the money, where

the policy is silent in the matter. Tayloe *v.* Merchants Fire Ins. Co., 9 How. 390.

"The fair conclusion would therefore seem to be that as this agent had been employed to complete the contract and had been entrusted with the renewal receipts, a prudent and ordinarily sagacious and experienced person might fairly expect that he was authorized to take a premium note, there being nothing in the policy to the contrary, and the assured having no knowledge of any limitation of the agent's authority. If this is so, the result would be that Mr. Paton was a person held out by the company as having authority to take a note for the premium and complete the contract by delivering the renewal receipt." (44)

In the opinion of Gwynne, J., expressed in Canadian Fire Insurance *vs* Robinson, (supra, p. 33) this decision is overruled by London & Lancashire *vs* Fleming, 1897, A. C. 499, infra, p. 41.

A condition in a policy of life insurance provided that if any premium, or note given therefor, was not paid when due, the policy should be void. A note given, payable with interest, in payment of a premium, provided that if it were not paid at maturity the policy should forthwith become void. On the maturity of the note it was partly paid, and an extension was granted. The last extension was overdue and balance on note was unpaid at the death of the assured. A receipt by the company, given at the time of taking the note, was of the amount of the premium, but at the bottom of the face of the receipt were these words: "Paid by note in terms thereof." While the note was running the policy was assigned for value, with the assent of the company, to the plaintiff, to whom the receipt was delivered by the assured:—Held, that no estoppel was created by the receipt; that there was no duty upon the company to have afforded the plaintiff an opportunity of paying the premium; and that the policy was void. (45)

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(44) Manufacturers Accident Ins. Co. *vs* Pudsey, 27 Can. S. C. R., 374.

(45) Wood *vs* Confederation Life Ins. Co., 2 N. B. Eq., 217.

Two policies on the mutual plan provided for insurances for the original period of one year and "during such further period or periods for which the assured shall from time to time *have paid in advance* the renewal premium or premiums required by the company, and for which the company shall have issued a renewal receipt or receipts." The policies were delivered to the plaintiffs, without prepayment of any cash premium, and without the previous delivery of the premium notes in consideration of which the policies purported to be issued; but the cash was paid and the notes delivered soon afterwards. At the termination of the year the defendants wrote to the plaintiffs enclosing a receipt for the amount of the cash premium for the renewal of both policies but which was higher than the preceding year. The letter was on a printed form, stating that a receipt "renewing" the policies was enclosed, and asking the plaintiffs to remit the amount of the cash premium. It also asked for new premium notes, and stated that the old ones were enclosed, as they were. The plaintiffs demurred to the increased note but retained the receipts and did not send the money or the notes until after the fire.

Held, that no contract of insurance existed between the plaintiffs and defendants; that if the plaintiffs had unqualifiedly accepted the renewal terms, the condition providing for payment in advance of the cash premium would have been waived; for the intention of the defendants in delivering the receipt, where the money had not in fact been paid, was to keep the policy in force and to give the plaintiffs credit for the amount. (46)

A policy of life insurance contained a provision to the effect that it should not be in force till the first premium was paid, and that if a note should be taken for the first or renewal premium, and not paid, the policy would be void, at and from default. The assured gave the Company's agent a promissory note which the agent discounted with his bankers, and was charged

(46) Doherty et al. *vs* Millers and Manufacturers Ins. Co., 4 O. L. R., 303, Street, J., affirmed 6 O. L. R., 78.

by the ompany with the premium, although unaware that the cash had not been paid by the assured. The ground upon which the plaintiff sought to recover rested upon the dealings between the Company and its agent. The Company assuming that the premium had been actually paid debited him with the amount. The trial judge gave judgment for the plaintiff. The Court of Appeal being evenly divided, this judgment stood affirmed but in the Privy Council this was reversed. It was contended for the plaintiff that the notes were placed in the hands of the agent that he might raise money by negotiating them by which the premium could be paid, and Sir Henry Strong, who gave the judgment of the Committee, says that this is an assumption which, in the entire absence of evidence of any arrangement to that effect, their Lordships could not make, and held finally that the onus was upon the plaintiff to prove that the premiums were paid in cash, and that the principle upon which the decision rested in the case of Acey *vs* Fernie applied. (47)

The facts of the case in Acey *vs* Fernie, (48) referred to above, were as follows:

The premium payable upon a life policy, became due on the 15th of March, but was not paid until the 12th of April, when the country agent, through whom the insurance had been effected, gave a receipt for the amount of the premium. The instructions given by the company to the agent were, that the premium on every life policy must be renewed within fifteen days from the time of its becoming due; if not paid within that time, that he was to give immediate notice to the office of such fact, and in the event of his omitting to do so, that his account would be debited for the amount, after the fifteen days had expired. No notice was given to the company of the non-payment of the premium within the fifteen days; it was therefore entered in their books as paid on the 15th of March, and the agent was debited for the amount. — Held, first, that the mere debiting the agent

(47) London & Lancashire Ins. Co. *vs* Fleming, 1897, A. C., 499.

(48) 7 M. & W., 151.

with the premium could not be considered as a payment to the company by the assured; secondly, that the agent having no authority to contract for the company, the fact of his receiving the money after the expiration of the fifteen days, and the entry in the company's books, debiting him with the amount, was no evidence of a new agreement between the company and the assured.

The most recent case in the Supreme Court of Canada, is that of Hutchings *vs* The National Life. (49)

In this case the facts were much the same as those in the Manufacturers' Accident *vs* Pudsey, except that the renewal receipt was not countersigned nor delivered to the assured. The policy contained a condition that the premium should be paid in cash in advance. The only reasons for judgment of the majority of the Court were those of Idington, J., who makes use of the following language:—"This case is clearly distinguishable from that of the Manufacturers' Accident Ins. Co. *vs* Pudsey, upon which appellant relies. There the renewal receipt which was a badge of authority in the hands of the agent was found by the jury to have been delivered over to the assured upon his payment of part of the premium and giving his note for the balance, and the court held correctly that there was evidence to go to the jury on that and other points in dispute.

"The failure of the assured here to get the receipt for the premium or perhaps even to have seen it and the peculiar circumstances connected with the retention of it by the agent tell against the assured having relied upon the agent having authority, or the company by any act of theirs inducing him to rely on the authority of the agent for doing as he did.

"The principles upon which the decision in the case of London & Lancashire Life Assurance Co. *vs* Fleming rests are decisively against the case of the appellant here.

"I think, therefore, that the appeal ought to be dismissed with costs."

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(49) 37 Can. S. C. R., 124.

Thirdly.—Where the policy issues with no condition requiring the premium to be paid in cash, but acknowledges its payment.

In this case, the liability of the company depends on whether it was the intention of the company that the policy should go into effect as a valid and binding contract upon its execution, in which case the company will be estopped from disputing its acknowledgment of the receipt of the premium; or, the intention of the company in executing the policy was that it should not go into operation until the premium was paid..

In both cases, the intention of the company will govern.

In a recent case, Lord Esher, M. R., said:—"The question raised is whether an insurance was effected by the sealing and signing of the policy or the execution of the policy was only intended to be conditional. I do not see any evidence of a conditional delivery or that this document was intended not to be a policy unless certain conditions were fulfilled. It is urged that the document was still in the hands of the company or of their officers in their behalf. There is no suggestion that it was delivered to anyone as an escrow. It was said that the recital was incorrect, and that the premium so stated to have been paid, never was in fact paid. I do not think the dedefendants are, for the present purpose, at liberty to show that in contradiction of the terms of their own deed. They have treated the premium as paid, and if it has not been paid, I think they have thereby waived the previous payment as a condition of the existence of an insurance." (50)

Fourthly. — Where the policy issues with no condition requiring the premium to be paid in cash, — and there is no acknowledgment of its payment, — in such case non payment of premium voids the policy.

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(50) Roberts *vs* Security Co., 1897, 1 Q. B., 111. (*Vide* La Cie d'Assurance des Cultivateurs *vs* Grammon, and Massé *vs* Hochelaga Mutual, *infra*, p. 50.

A policy contained no provision that it was to be void if the premiums were not paid. The first premium was paid by two agreements in the form of promissory notes maturing at different dates and each providing that the policy was to be void if it was not paid at maturity. When the assured died the first agreement was overdue and unpaid and the second had not matured. The court, without reserving judgment dismissed an appeal from the decision of the Court of Appeal, (20 A. R. 564), holding the policy void. (51)

OTHER CASES.

A case arose upon the construction of R. S. O. 1877, c. 161, s. 34, which provided as follows: "Any policy which may be issued for one year, or any shorter period may be renewed at the discretion of the Board of Directors by renewal receipts instead of policy, on the insured paying the required premiums, or giving his premium note or undertaking, and any cash payments for renewal must be made by the end of the year or other period for which the policy was granted. Otherwise such policy shall be null and void."

It appeared that the company's agent, upon making a renewal, agreed to take a set of harness as part payment for the renewal premium. The harness was to have been received in June, but was not so received until October or November, after the fire.

Boyd, C., says: "The general rule is well settled that an agent instructed to receive payment for the principal cannot accept anything else than money. If payment is made out of the usual course, it lies on the person who sets up the exceptional mode of payment to shew the authority of the agent to bind his principal." The Chancellor continues:—"I cannot put the case more forcibly than in the language of Byles, J., in Sweeting *vs* Pearce, 7 C. B. N. S. 485: "The general rule of law is that an

(51) Frank *vs* The Sun Life Ass. Co., 23 Can. S. C. R., 152.

authority to an agent to receive money, implies that he is to receive it in cash. If the agent receives the money in cash, the probability is that he will hand it over to his principal: but, if he is to be allowed to receive it by means of a settlement of accounts between himself and the debtor he might not be able to pay it over; at all events, it would very much diminish the chance of the principal ever receiving it, and upon that principle, it has been held as a general rule that the agent cannot receive payment in anything else but cash.'" (52)

Where a policy of insurance provided that upon payment of three annual premiums, certain privileges would arise in favour of the insured, it was held that the giving of a promissory note for the 3rd premium which was not paid at maturity, was not a payment of the premium, and accord and satisfaction could not be invoked to have it treated as such. (53)

Where a policy of life insurance expressly provides that payment of the premium in cash to the company is necessary, their agent has no power to bind the company by giving the policy-holder a receipt for the amount of a premium as payment for services alleged to have been rendered by the policy-holder to the company. (54)

Waiver of payment of premium.

An insurance agent cannot waive the condition requiring payment of premium against the provision of the policy but a general agent who represents the company may do so.

A policy of insurance expressly provided that if the amount of any annual premium or the interest due on any note taken in part payment of a former annual premium was not fully paid on the day and in the manner provided for, the policy should be null and void and wholly forfeited. And by another condi-

(52) Frazer *vs* Gore District Mutual, 2 O. R., 416.
(53) Tilley *vs* Confederation Life Ins. Co., 7 B. C. Rep., 144.
(54) Tiernan *vs* People's Life Ins. Co., 23 A. R., 342.

tion it was provided that no agent of the company, except the president or secretary, should waive or alter any condition expressed in the policy, or in any note, cheque or draft given to or accepted by the company in settlement of any premium. The premium never was in fact paid, nor was the policy delivered. The court said:—"Admitting it to be true that the plaintiff did tender the premium to the agent at St. John, and that he declined to receive it and agreed to give time for the payment of it till it was demanded, and to hold the policy in the meantime for the plaintiff, it is also true, as admitted by the pleadings, that such agent was neither the president nor the secretary of the company, and therefore, by the express conditions of the policy, had no authority to waive or alter any of its conditions. If there was no binding contract the acknowledgement in the policy that the advance premium had been paid amounts to nothing. (55)

"The intention of the parties was that the policy should not be delivered till the premium was paid; hence the acknowledgement of payment was properly inserted; but it was no admission of payment so long as the policy remained in the hands of the agent, awaiting the payment by the plaintiff to give vitality to the contract." (56)

And in Quebec it was held that a condition avoiding a policy for non-payment of the premium cannot be waived by an agent. (57)

A life policy provided that payment, if made when overdue, would not be considered as continuing the policy unless the insured was in good health at the time. In this case the payment was made after the 30 days, and it was proved that it was the practice in certain cases to accept payment after the day mentioned. The declaration averred that the quarterly payment was not paid on the day it became due, but afterwards the defendants waived the default and accepted payment during in-

(55) But vide Roberts *vs* The Security Company, supra, pp. 22 30, 43.

(56) Calhoun *vs* Union Mutual Life Ins. Co., 19 N. B. Rep., 13.

(57) Bernier *vs* Martin, Q. R., 9 S. C., 421.

sured's life. Plea denying the waiver. Under these circumstances, Hagarty, J., says: "We are relieved from any difficulty as to the authority of the agent to waive a forfeiture. The money was paid to the sub-agent, Dempsey, who had authority to receive payment of premiums, and the jury found that it was accepted unconditionally."

It was shown also that the general agents received the premium from the sub-agent after the 30 days. Gwynne, J., says: "The general agent of a foreign company doing business in this country must, I think, for the purpose of receiving premiums, be regarded in the same light as the company themselves." (58)

J. M. was insured by a life policy of the defendant Company. S. was the resident secretary in Canada of the defendants, with powers of a general manager, with whom was associated a local board of directors. S. arranged with J. M. to take his note for premiums. One note was overdue and the other current. The jury found that the notes were taken by S. as cash payments and that the taking of them was within his authority; that he had waived payment upon the dates the premiums were due.

The majority of the Court held that there was evidence upon which the jury was fully warranted in finding that the agent had authority to take notes for the premium in lieu of cash payments. (59)

NON-PAYMENT OF PREMIUM MAY BE AFFECTED BY SPECIAL PROVISIONS OF THE POLICY.

By the terms of a life insurance policy it was provided that a policy in force for three years would entitle the holder to a paid up policy for $150, or to have the existing policy extended for one year, and at the end of that year a paid up policy for $47; and a policy in force for five years would entitle the holder to $66 in cash, or a loan of $85, or a paid up policy of $250, or the extension of the existing policy for two years, and at the end of

(58) Campbell *vs* National Life, 24 U. C. C. P., 133.
(59) Moffatt *vs* Reliance Ins. Co., 45 U. C. R., 561.

that time a paid up policy for $84. Clause 5 of the conditions of the policy provided that one calendar month would be allowed for payment of renewal premiums, at the expiration of which time, if the premium remained unpaid, the policy should cease to be in force. The trial judge held that it was not necessary for the holder of the policy to make application in order to have the policy extended, and that the insurers were bound to apply the money in hand, namely, the $66 shown in the schedule, towards the purchase of the extended insurance, and accordingly there was no lapse and the policy was in full force when the insured died.

The Court of Appeal reversed the trial judge and held that on the non-payment of the premium the policy lapsed, and that nothing was done towards extending or reviving it or obtaining any of the alternative benefits pointed out in the policy. (60)

PAYMENT OF PREMIUM AFTER LOSS WILL NOT REVIVE THE POLICY.

A fire occurred on the 13th September. On the 15th September the plaintiff, through a solicitor, paid the amount of an overdue insurance premium note to the defendants, who were ignorant of the loss. On the 17th September, notice of loss was given to the defendants, when they immediately returned the premium to the solicitor. Held, that the payment, having been made in fraud of the defendants, could not avail the plaintiff. (61)

QUEBEC CASES.

The following articles of the Civil Code relate to the premium:

Art. 2469: "The consideration or price which the insured obliges himself to pay for the insurance, is called the premium.

(60) Pense *vs* Northern Life Ass. Co., 15 O. L. R., 131. This case has been appealed to the Supreme Court and stands for judgment.

(61) Sears *vs* Agricultural Ins. Co., 32 U. C. C. P., 585.

It does not belong to the insurer until the risk begins, whether he has received it or not."

Une compagnie d'assurance, qui ne fournit pas, à un appliquant, une police d'assurance conforme à l'application, ne peut pas se faire payer les primes stipulées au contrat.

Dans ce cas, l'assuré a le droit de discontinuer le paiement des primes d'assurance convenues. (61a)

Art. 2500 C. C.

"The insured is obliged to pay the amount or rate of premium agreed upon, according to the terms of the contract. If the time of payment be not specified, it is payable without delay."

The agent of an insurance company has no authority to accept an insurance and give a receipt for the premium in exchange for a receipt for his individual debt to the person insuring, and such an act on his part will not bind the company. (61b)

Art. 2583: "When by the terms of the policy a delay is given for the payment of the renewal premium, the insurance continues, and if a loss occur within the delay, the insurer is liable, deducting the amount of the premium due."

Where an insurance company, without any reservation, accepts a promissory note of the assured for the amount of the premium, payment whereof is acknowledged by the policy to have been received, failure of the assured to pay the note at maturity does not affect the validity of the insurance. In pronouncing judgment, Sir A. A. Dorion, C. J., says:—"L'appelante a plaidé que, d'après une des conditions de la police, un assuré ne peut recouvrer la perte qu'il a faite, s'il n'a payé sa prime d'assurance; que l'intimé n'a jamais payé sa prime d'assurance, mais que le 11 de décembre 1875 il a donné son

(61a) La Cie d'Assurance Canadienne sur la Vie vs Perrault, M. L. R., 5 S. C., 62; 12 L. N., 229.

(61b) Citizens' Ins. Co. of Canada *vs* Bourguignon, 1886, M. L. R. 2 Q. B. 22.

billet à trois mois pour $5.80 pour sa prime, et qu'il n'a jamais payé ce billet, quoiqu'il en ait été souvent requis.

"L'admission contenue dans la police, que la prime a été payée, indique suffisamment que le billet a été accepté comme un paiement effectif, qui ne peut plus être contesté par la compagnie appelante, dont le seul recours est peut être payée du billet de l'intimé." (62)

One of the conditions of a policy provided that in case any promissory note for the first payment of any deposit note should remain unpaid for thirty days after it was due, the policy should be void. An assessment was made upon the deposit note, and instead of paying it the plaintiff gave his note at 30 days, which he did not pay, and which remained overdue at the time of the fire. The policy on its face admitted the payment of the first premium. The Superior Court held, per Johnston, J., that the company confessing under its seal that it had received payment, could not be allowed to prove this statement to be untrue. (63)

These last two cases would appear to be decided on the same principle as Roberts *vs* The Security Co., supra, pp. 22, 30, 43, 46.

SET OFF OF PREMIUM AGAINST LOSS.

Un assuré ne peut opposer, en compensation de sa prime d'assurance, les dommages qu'il allègue avoir éprouvés par un incendie, attendu que la créance de tel assuré n'est ni claire ni liquide, et que le paiement de la prime d'assurance est une condition préalable de la part de l'assuré à l'exercice d'aucun droit et au recouvrement des pertes couvertes par la police d'assurance. Loranger, J. 1885. (64)

LOSS OR DAMAGE BY FIRE.

The loss or damage insured against is the actual physical loss of or damage to the article insured. It does not include the in-

(62) La Cie d'Assurance des Cultivateurs *vs* Grammon, 3 L. N., 19; 24 L. C. J., 82.

(63) Massé *vs* Hochelaga Mutual Ins. Co., 22 L. C. J., 124.

(64) Gilles *vs* Giroux, 13 R. L., 652.

direct or consequential loss to the insured, such as loss of profits, loss of business, &c.

DIRECT LOSS.

In all policies of fire insurance, the words "loss or damage by fire" are mentioned in the body of the contract as being the subject matter of the indemnity which the assured undertakes by the contract. In some policies these words are preceded by the word "direct". This is the form used by the Sun Insurance Co., the oldest fire insurance company in business to-day, while the London Assurance Co. policy, an almost equally old company, simply uses the words "loss or damage by fire". The standard policy in New York State, and in the other States of the Union which have adopted the New York policy, contain the word "direct", while the Massachusetts and New Hampshire standard policies omit it. The word has no significance or value, and whether used or not, fire must be the proximate cause of the loss or damage.

MARKET VALUE.

The plaintiff obtained judgment against the insurance company for £200 being amount insured by them on his stock and utensils in trade as a general turner; by the policy the appellants agreed to pay or make good to the insured all such loss or damage as the said insured should suffer by fire. On appeal, held, that the defendants were liable only for the actual market value of such stock at the time of the loss and not for the actual cost thereof, or the sum which it may have cost the party insured, notwithstanding that he had not insured his profits on the subject of insurance. (64a)

Where a separate insurance is effected on separate properties, the company only to pay as if they had insured two thirds of the

(64a) Equitable Fire & Life Ins. Co., *vs* Quinn, Q. B. 1861, 11 L. C. R. 170.

actual cash value, the insured can recover two thirds only of the particular property injured. (64b)

Plaintiff insured with defendants for $3,400 of which $1,000 was on his tannery and $500 on the machinery in it, upon an application valuing the tannery and fixtures at $1,000, which was said to be two thirds of the actual value, but the plaintiff agreeing that in case of loss defendants should only be liable as if they had insured two thirds of the actual cash value, anything in the policy or application notwithstanding. The application was referred to in the policy as forming part of it, and stated the promise to be to pay all losses or damages not exceeding the said sum of $3,400, the said losses or damages to be estimated according to the true and actual value of the property at the time the same should happen. The building and machinery having been destroyed by fire, the jury found the total cash value of the former to be $1,050 and of the latter $750.

Held, that the plaintiff could recover only two thirds of these sums. (64c)

A policy insuring several different subjects of insurance at separate amounts, and containing a provision that "the company shall be liable to pay to the insured two thirds of all such loss or damage by fire as shall happen to the property, amounting to no more in the whole than the aggregate of the amounts insured, and to no more on any of the different properties than two thirds of the actual cash value of each at the time of the loss, and not exceeding on each the sum it is insured for," is to be treated as a separate insurance upon each subject, and the company is liable only for two thirds of the loss on each, notwithstanding that on some of the subjects the loss is less than the amount for which those subjects are insured, and the whole loss less than the aggregate amount insured. (64d)

(64b) McCulloch *vs* Gore District Mutual Fire Ins. Co., 32 U. C. R. 610.

(64c) Williamson *vs* Gore District Mutual Fire Ins. Co., 26 U. C. R. 145.

(64d) King *vs* Prince Edward County Mutual Ins. Co., 19 U. C. C. P. 134.

Limitation of amount recoverable.

By by-laws printed on the policy the defendants' liability was limited to two-thirds of the actual loss sustained, and the amount to be taken on one risk was restricted to $2,000. The plaintiff's loss was $2,200, and an other insurance company paid the full amount of their liability $1,000. Held, that the plaintiff was entitled to recover as damages, two-thirds of the balance of his loss after deducting the amount of the other insurance. (64e)

Interest.

In an action upon fire insurance policies, a referee was directed to inquire, ascertain and report the amount of the loss. Held, having regard to the provisions of ss. 87 and 103 of R. S. O. 1887, c. 44, that the referee had authority to allow interest on the amount of the loss as ascertained by him. (64f)

COMBUSTION.

In determining whether fire is the proximate cause of the loss or damage, a distinction must be drawn between two cases:

First, where the damage or loss is not by actual combustion, yet the damage has resulted by a direct chain of cause and effect from a fire which has destroyed other property in the same premises, all being covered by the policy of insurance.

Second, where there has been no actual combustion by fire of any of the property covered by the policy.

In the former case it has been held that the company is liable; in the latter, that the company is not liable.

This distinction may be more readily understood by citing two of the leading cases on the subject.

(64e) McIntyre *vs* East Williams Mutual Fire Ins. Co., 18 O. R. 79.

(64f) Attorney General *vs* Ætna Ins. Co., 13 P. R. 459.

In support of the first proposition may be cited the case of Lynn Gas & Electric Co. *vs* Meriden Fire Ins. Co. (65)

At the trial, it appeared that within the period for which the policies were written a fire occurred in the wire tower, so called, of the plaintiff's building, through which the wires for electric lighting were carried from the building, which fire was speedily extinguished, without contact with other parts of the building and contents, and with slight damage to the tower or its contents; that at about the same time, and in a part of the building remote from the fire and untouched thereby, there occurred a disruption by centrifugal force of the fly-wheel of the engine and of certain pulleys connected therewith, by which disruption the plaintiff's building and machinery were damaged to a large amount. The theory of the plaintiff, connecting the disruption of the machinery with the fire in the tower, as stated by the presiding judge in his charge to the jury, was as follows:— The plaintiff says the position of the lightning arresters in the vicinity of the fire was such that by reason of the fire in the tower a connection was made between them called a short circuit; that the short circuit resulted in keeping back or in bringing into the dynamo below an increase of electric current that made it more difficult for the armature to revolve than before, and caused a higher power to be exerted upon it, or at least caused a greater resistance to the machinery; that this resistance was transmitted to the pulley by which this armature was run, through the belt; that that shock destroyed the pulley; that by the destruction of that pulley, the main shaft was disturbed and the succeeding pulleys up to the jack-pulley were ruptured; that by reason of pieces flying from the jack-pulley, or from some other cause, the fly-wheel of the engine was destroyed, the governor broken, and everything crushed; — in a word, that the short circuit in the tower by reason of the fire caused an extra strain upon the belt through the action of electricity, and that caused the damage. The Court said:

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(65) 158 Mass., 570.

"The plaintiff contended that the short circuit was produced by the fire, either by means of heat on the horns of the lightning arresters, or by a flame acting as a conductor between the two horns, or in some other way. The jury found that the plaintiff's theory of the cause of the damage was correct, and the question is whether the judge was right in ruling that an injury to the machinery caused in this way was a "loss or damage by fire" within the meaning of the policy.

"The subject matter of the insurance was the building, machinery dynamos, and other electrical fixtures, besides tools, furniture, and supplies used in the business of furnishing electricity for electric lighting. The defendants, when they made their contracts, understood that the building contained a large quantity of electrical machinery, and that electricity would be transmitted from the dynamos, and would be a powerful force in and about the building. They must be presumed to have contemplated such effects as fire might naturally produce in connection with machinery used in generating and transmitting strong currents of electricity.

"The subject involves a consideration of the causes to which an effect should be ascribed when several conditions, agencies, or authors contribute to produce an effect. The defendants contend that the application of the principle which is expressed by the maxim, *In jure non remota causa sed proxima spectatur,* relieves them from liability in these cases. It has often been necessary to determine, in trials in court, what is to be deemed the responsible cause which furnishes a foundation for a claim when several agencies and conditions have a share in causing damage, and the best rule that can be formulated is often difficult of application. When it is said that the cause to be sought is the direct and proximate cause, it is not meant that the cause or agency which is nearest in time or place to the result is necessarily to be chosen. The active efficient cause that sets in motion a train of events which brings about a result without the intervention of any force started and working actively from a new and independent source is the direct and proximate cause referred to in the cases.

"In the present case, the electricity was one of the forces of nature — a passive agent working under natural laws, — whose existence was known when the insurance policies were issued. Upon the theory adopted by the jury, the fire worked through agencies in the building, the atmosphere, the metallic machinery, electricity, and other things; and working precisely as the defendants would have expected it to work if they had thoroughly understood the situation and the laws applicable to the existing conditions, it put a great strain on the machinery and did great damage. No new cause acting from an independent source intervened. The fire was the direct and proximate cause of the damage according to the meaning of the words 'direct and proximate cause', as interpreted by the best authorities."

As illustrative of the second proposition, Marsden *vs* City & County Assurance Co. (66), may be cited. The following bstract from the judgment of Erle, C. J., substantially sets out the question in issue, and the law thereon:

"The conclusion I have come to is, that this rule should be discharged. The action is upon a policy of insurance on plate-glass; and the question is, whether the damage in respect of which the plaintiff claims compensation is within an exception contained in the policy. The insurance is against "loss or damage originating from any cause whatsoever, except fire, breakage during removal, alteration, or repair of premises". The defendants contend that this loss originated from fire or from breakage during removal, and so is within the exception. The circumstances were these: — The glass insured was plate-glass in the plaintiff's shop-front. A fire occurring in some premises adjoining the plaintiff's and communicating with a distant part of the plaintiff's house, the plaintiff got some of his neighbours to assist him in removing his furniture and stock-in-trade; and, whilst they were thus engaged, the assembled mob feloniously broke in the windows for the purpose of plunder. Hence, no doubt, the remote cause of the damage was fire; but the prox-

(66) L. R., 1 C. P., 232.

imate cause was the lawless violence of the mob. I think the general rule of insurance law, that the proximate and not the remote cause of the loss is to be regarded, is the rule which must govern our decision in this case. The assembling of the crowd was caused by the fire; and but for the fire probably the plaintiff's windows would not have been broken. But the breakage was not caused by the fire; it was the result of the plaintiff's attempt to save his stock and furniture, coupled with the desire of the mob to seize what they could lay their hands on. I do not see how that can be said to be a damage originating in or caused by fire, so as to bring it within that part of the exception."

The same point was dealt with in the case of Everett *vs* London Ass. Co. (67) By the terms of the policy, the premises were insured against "such loss or damage as should or might be occasioned by fire to the property therein mentioned." A quantity of gun powder had exploded about half a mile from the plaintiff's premises, whereby the windows and window frames, and the premises generally were damaged by atmospheric concussion caused by the explosion. The question for the opinion of the court was whether the damage so caused was a loss or damage insured against under the policy. The court held that the defendants were not liable. Willes, J., said: "I am of the same opinion. We are bound to look to the immediate cause of the loss or damage, and not to some remote or speculative cause. Speaking of this injury, no person would say that it was occasioned by fire. It was occasioned by a concussion or disturbance of the air caused by fire elsewhere. It would be going into the causes of causes to say that this was an injury caused by fire to the property insured. The rule *"In jure non remota causa, sed proxima spectatur"*, determines this case."

And Byles, J., said: "I am of the same opinion. The expression in the policy which we have to construe is, 'loss or damage occasioned by fire.' Those words are to be construed as ordinary people would construe them. They mean loss or damage either

(67) 19 C. B. N. S., at p. 126.

by ignition of the article consumed, or by ignition of part of the premises where the article is: in the one case there is a loss, in the other a damage, occasioned by fire. Lord Bacon, says: (68) 'It were infinite for the law to judge the causes of causes, and their impulsions one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree.' If that were not so, a ship in the neighbourhood of Mount Etna or Vesuvius during an eruption, and receiving damage from substances projected therefrom, might be said to be damaged by fire. So, a shot falling amongst crockery-ware might in one case be said to occasion a loss by fire. But neither of these cases would fall within these words, which must be understood in their plain and ordinary sense."

Salvage losses covered by policy.

It is not necessary that combustion should have been the sole cause of the loss or damage, but the policy has been held to cover the losses which resulted from a *bonâ fide* and reasonable attempt to save the insured property. In Stanley *vs* Western Ins. Co., (69) Kelly, C. B., says: "I agree that any loss resulting from an apparently necessary and *bonâ fide* effort to put out a fire, whether it be by spoiling the goods by water or throwing the articles of furniture out of window, or even the destroying of a neighbouring house by an explosion for the purposes of checking the progress of the flames, in a word, every loss that clearly and proximately results, whether directly or indirectly, from the fire, is within the policy."

Ontario cases.

The plaintiff's stock-in-trade was insured against loss by fire in the defendant company; a fire occurred in an adjoining building; and the plaintiff's warehouse being in danger of de-

(68) Maxims of the Law, Reg., Montagu, vol. 13, p. 145, 1 Bacon's Works, by Basil.
(69) L. R., 3 Exch., 71.

struction, he removed his stock which was thereby damaged, and some of it lost.

The question submitted by the special case was, whether the plaintiff was entitled to recover the full amount of the policy; or whether the defendants were discharged as by ratable payment under the 5th statutory condition, (R. S. O. (1877), ch. 162), which declares that in case of the removal of the property to escape conflagration the company will ratably contribute to the loss and expenses attending such act of salvage?

Osler, J. A., held that the plaintiff was entitled to recover the full amount of the policy, and gave judgment for $1,000 and interest.

Hagarty, C. J., said:—"The weight of opinion and authority seems to be in favour of the view taken by my brother Osler, from whose judgment is this appeal.

"Our own case of Thompson *vs* Montreal Insurance Co. (70) is clear in favour of the view that goods lost in course of removal to escape conflagration are considered as lost by fire, as the proximate cause.

"This seems to be assumed as the law in Levy *vs* Baillie. (71) The plaintiff, an upholsterer, swore to a loss over the amount of the policy: that the loss was sustained as to a small amount for goods injured in process of removal, and a large amount 'abstracted' by the crowd assembled at the fire. The defence was fraud and false swearing on this proof. At the trial evidence was given of the loss, and the company defended on the ground that such a quantity of goods could not have been, and were not stolen. The case went to the jury wholly on that question. They found for the plaintiff, and the following term a new trial was, after argument, granted on the weight of evidence. Neither at the trial nor in term was any question raised as to liability for goods so stolen or lost." (72)

(70) 6 U. C. R., 319.
(71) 7 Bing., 349.
(72) McLaren *vs* Commercial Union 12 A. R., 279.

THE AMERICAN DECISIONS ARE NOT UNIFORM.

The rule laid down by the Court in White *vs* The Republic, (73) would seem to commend itself:—"We think the liability of the underwriters, in these and similar cases, depends very much upon the imminence of the peril, and the reasonableness of the means used to effect the removal. The necessity for removal is analogous to the necessity that justifies the sale of a disabled vessel, by the water. It is not to be determined by the result alone, but by all the circumstances existing at the time of the fire. The necessity for removal need not be actual, that is, the building may not have been actually burned, since this may have been prevented by a change in the direction or force of the wind, the more skilful or efficient management of the fire engines, or the sudden happening of a shower, or a like unforeseen event. But the imminence of the peril must be apparent, and such as would prompt a prudent uninsured person to remove the goods; it must be such as to inspire a conviction that to refrain from removing the goods would be the violation of a manifest moral duty; the damage and expense of removal, too, must be such as might reasonably be incurred under the circumstances of the occasion."

QUEBEC CASES.

The liability of the assured for losses other than from combustion is to the same effect under the Civil Code of the Province of Quebec. Article 2580 reads as follows:

"The insurer is liable for all losses which are the immediate consequence of fire or burning for (74) whatever cause it may arise, including damage to the things insured suffered in their removal or by the means used for extinguishing the fire, subject to the special exceptions contained in the policy."

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(73) 2 Am. Rep., 22.

(74) The word "for" in the English translation should have been "from", the French version reading "quelqu'en soit la cause."

This article is based upon two decisions of the Court of Queen's Bench.

In the first case the trial judge had charged the jury that if they were satisfied that the property was stolen in the removal, they must come to the conclusion that this was a loss for which the insurance company were liable. A verdict was found for the plaintiff for the full amount claimed, and a motion was made to the full Court for a new trial, on the ground of misdirection by the trial judge, which was refused. (75)

Similarly in the case of Harris *vs* London & Lancashire Fire Ins. Company, (76) the trial judge charged the jury as follows:

"The rule which I think you may follow in this case is that which was laid down lately by Mr. Justice Monk, in the case of McGibbon *vs* The Queen Insurance Company, and which afterwards, received the sanction of the Superior Court of Montreal, namely: That the value of goods which, without any fault on the part of the insured, are lost or stolen during the confusion caused by a fire, or whilst being removed from the burning premises, ought to be borne by the insurers. I feel that in laying down the rule in this way, I go as far as I can in favour of the plaintiff, but I doubt whether the laying down of a more stringent rule would be consistent with justice, conducive to the public good, or even for the advantage of insurance companies. If insurers are to be considered clear the instant the effects insured are beyond the reach of the flames, whether afterwards unavoidably lost to the party insured or not—then the latter might be disposed to say, whilst my effects remain in my house they are at the risk of the insurers, whereas, if put into the street, they will be at my risk; I therefore will prevent their removal until, at any rate, I can have due precautions for their preservation out of doors. Moreover, when a house is found to be on fire, strangers are let in to assist in extinguishing the flames, and in saving the goods. It is for the interest of the insurers that this should

(75) McGibbon *vs* The Queen Ins. Co., 10 L. C. J., 227.
(76) 10 L. C. J., 268.

be done, and losses resulting from a proceeding adopted mainly for their benefit, ought not to fall upon the insured."

STOLEN GOODS COVERED.

Under the terms of a contract between insurers and insured, whereby the insurers insure against loss or damage by fire, the insurers are liable for losses to the insured by goods stolen at a fire. (77)

ARSON.

A plea of arson by the insured, if established, is obviously a complete defence to an action on the insurance policy. But the jury must be satisfied that the crime imputed is as fully proved as would justify them in finding him guilty of a criminal charge for the same offence. Where such a plea appears on the record, the rule has been laid down on the subject of new trials, that in the absence of misdirection, where the jury find in favour of a party expressly charged with a criminal offence, the Court will rarely subject him a second time to the finding of a jury. (78)

In an action on a fire insurance policy, (79) in which the jury found against the defendants upon the plea of arson and judgment was entered in favour of the plaintiff. Upon an application for a new trial, the court said:

"We were much pressed during the argument by counsel for the defendants to make absolute the rule for a new trial on the plea of arson.

"After some consideration, we offered to make the rule absolute for a new trial on terms which, after last Michaelmas term, were communicated to the defendants, but which they are unable to accept. We must now decide whether we ought to do

(77) Monk, J., 1866, McGibbon *vs* Queen Ins. Co., 10 L. C. J., 227; 16 R. J. R. Q., 1.

(78) Gould *vs* British American Ins. Co., 27 U. C. R., 473.

(79) Frey *vs* Mutual Fire Ins. Co., 43 U. C. R., 102.

so, on the ground that the verdict is contrary to evidence and the weight of evidence.

"The charge of arson made against the plaintiff is not only one involving much moral turpitude, but one which if true may be followed by serious punitive consequences." "In Thurtell *vs* Beaumont, (80) which was an action against an insurance company to recover a loss by fire, the defence being arson, the Judge directed the jury that, in order to their finding a verdict against the plaintiff, they ought to be satisfied that the crime imputed to him was as fully proved as would justify them in finding him guilty of the criminal charge for the same offence. And it was held that the direction was right."

"In Kane *vs* The Hibernian Mutual Fire Ins. Co., (81) the Court, after an elaborate review of the authorities, reached a conclusion the same as established in England by the old case of Thurtell *vs* Beaumont."

"The latter appears to be the rule adopted in this Province: See Richardson *vs* Canada West Farmers' Fire Ins. Co., 17 C. P., 341."

"At a very early period in the history of the Province it was said that 'when the party charged has been acquitted after a full investigation, the evidence against him should be conclusive before the Court could properly subject him to answer the charge a second time': Wilson *vs* Hill, 5 U. C. R. (O. S.), 56-57.

"At a later but still early period the Court said, 'in cases of this kind we should with difficulty grant a second chance to the party urging such a defence'; Wallbridge et al. *vs* Follett, 2 U. C. R., 280, 281."

"In the comparatively modern case of Edgar *vs* Newell, 24 U. C. R., 215, 218, it was said that 'it is not usual to put a plaintiff deliberately charged with fraud or felony in a civil action twice, as it were, upon his trial.'

"In Gould *vs* The British America Fire Ins. Co., 27 U. C. R., 473, 479, it was said, 'We do not on the whole see our way to,

(80) 1 Bing., 339.
(81) 20 Am. R., 408.

as it were, again putting the plaintiff on his trial for this serious charge,' " (arson).

In McMillan *vs* The Gore District Mutual Fire Ins. Co., 21 C. P., 123, 125, it is said, 'It is sufficient to say that there is no rule on the subject so inflexible as to govern a case like this' (arson);" and a new trial was ordered, costs to abide the event.

"The conclusion to be drawn from the cases is that, while the Court has the power in the exercise of discretion to grant a new trial in such a case, the discretion is not one to be exercised, except where the evidence so preponderates in favour of the truth of the charge as to evince, as it were, a determination on the part of the jury not to give effect to the law."

On appeal to the Court of Appeal this judgment was affirmed. (82) A further appeal was taken to the Supreme Court, where the judgment of the Court of Appeal was reversed, but the question of the plea of arson was not raised in that Court, the judgment of the court below being reversed solely on the ground that the Fire Insurance Policy Act did not apply to mutual insurance companies. (83)

But an action on the policy will not be stayed pending criminal proceedings.

In an action brought to recover upon a policy of insurance, an exception *dilatoire,* in which it is alleged that a true bill has been found against the plaintiff on a charge of arson, with a view to defraud the defendant, and that therefore all proceedings in the case must be stayed and held in abeyance until he shall have been tried upon an indictment, must be dismissed and the existence of a criminal charge against the plaintiff cannot operate a suspension of proceedings in the action against the defendant. (84)

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(82) 4 A. R., 293.

(83) 5 Can. S. C. R., 82.

(84) Maguire *vs* Liverpool & London F. & L. Ins. Co., 7 L. C. R., 343; 5 R. J. R. Q., 279.

EXCESSIVE HEAT WITHOUT IGNITION.

In Quebec, the Code excepts from the liability of the company, loss resulting from excessive heat without ignition.

Art. 2581. "The insurer is not liable for losses caused merely by excessive heat in a furnace, stove or usual means of communicating warmth when there is no actual burning or ignition of the thing insured."

SPONTANEOUS COMBUSTION.

But the policy will cover spontaneous combustion.

Une assurance contre le feu, effectuée sur une certaine quantité de charbon, couvre le charbon qui existait alors et celui apporté depuis, et s'étend aux risques provenant de la combustion spontanée du charbon. (85)

EVIDENCE OF LOSS MUST BE SATISFACTORY.

In the absence of satisfactory evidence that certain goods, the value whereof is claimed under a fire policy, were either actually destroyed or damaged by fire or stolen, the claim therefor cannot be recovered. Meredith, C. J., 1866. (86)

But it was held by the Court of Appeal, Quebec, that if the evidence leaves a certain amount of doubt as to the actual value of the buildings destroyed, the balance should be turned against the insurance company rather than against the insured. Insurers should exercise vigilance as to over valuations when they are taking the risks and accepting the premiums, rather than after the loss occurs and they are called upon to discharge their part of the obligation. (86a)

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(85) British American Ins. Co. *vs* Joseph, 9 L. C. R., 448; 7 R. J. R. Q., 312.

(86) Harris *vs* London & Lancashire Fire Ins. Co., 10 L. C. J., 268; 16 R. J. R. Q., 13.

(86a) Citizens' Ins. Co. *vs* Lefrançois, Q. R. 2, Q. B. 550.

EXCEPTIONS IN POLICY TO LOSSES FROM BURNING FORESTS.

A policy of insurance contained the following condition endorsed upon it, viz: "The Company will not be answerable for any loss and damage by fire occasioned by earthquakes or hurricanes *or by burning of forests;* and this policy shall remain *suspended and of no effect* in respect of any loss or damage (however caused) which shall happen or arise during the existence of any of the contingencies aforesaid."

Such a clause is legal and in order to exempt the company from liability, it is only necessary to prove that at the time of the loss the neighbouring forests were burning. (86b)

GROSS NEGLIGENCE.

Gross negligence in some American States has been held inconsistent with good faith and the assured held not liable. This also is the law in the Province of Quebec, under the express provisions of the Civil Code, by the following article:

2578. "The insurer is liable for losses caused by the insured otherwise than by fraud or gross negligence."

THE JURISPRUDENCE IN FRANCE IS TO THE SAME EFFECT.

L'assureur n'est pas tenu des pertes qui proviendraient d'un fait personnel à l'assuré; l'équité ne permet pas que l'un des contractants puisse donner lui-même naissance à l'évènement qui rend l'autre partie obligée envers lui. Pardessus, n. 590-1o.

NEGLIGENCE.

The policy of insurance covers the negligence of the insured as well as of his servants. This is the law long established in cases of marine insurance. In Walker *vs* Maitland, (87) Ab-

(86b) Commercial Union Ass. Co. *vs* Canada Iron Mining, etc., Co., 18 L. C. J., 80; 23 R. J. R. Q., 466, 534.

(87) 5 B. & Ald., 171.

bott, C. J., says: "No decision can be cited where in such a case the underwriters have been held to be excused in consequence of the loss having been remotely occasioned by the negligence of the crew." Bayley, J., says:—"Here, the loss arose from the sloop with the goods on board having been beat to pieces by the force of the winds and waves; and the question in this case is, whether the underwriters are exonerated from the loss, by proving negligence on the part of the crew, although the damage was occasioned by the perils of the sea. It is the duty of the owner to have the ship properly equipped, and for that purpose, it is necessary that he should provide a competent master and crew in the first instance; but having done that, he has discharged his duty, and is not responsible for their negligence, as between him and the underwriters." Holroyd, J., says:—"The rule of law is, that *proxima causa non remota spectatur,* and here the proximate cause of the loss was the peril of the sea. The question is, whether the underwriters are liable for a loss proceeding directly from a peril of the sea, but remotely from the negligence of the crew."

A case directly in point however is Shaw *vs* Robbards. (88) In this case one ground of defence was that the assured had negligently committed the subject matter of the insurance to be used for a more dangerous operation than was contemplated by the policy.

As to this plea, Lord Denman, C. J., said:—"One argument more remains to be noticed, viz: that the loss here arose from the plaintiff's own negligent act, in allowing the kiln to be used for a purpose to which it was not adapted. There is no doubt that one of the objects of insurance against fire is to guard against the negligence of servants and others; and, therefore, the simple fact of negligence has never been held to constitute a defence. But it is argued that there is a distinction between the negligence of servants or strangers and that of the assured himself. We do not see any ground for such a distinction; and are of opinion that, in the absence of all fraud, the proximate cause of the loss only is to be looked to."

(88) 6 A. & E., 75.

This is also the law in the United States. In the Lynn Gas & Electric Co. *vs* Meriden, above cited, the Court says:—"Where the negligent act of the insured or of anybody else causes a fire, and so causes damage, although the negligent act is the direct proximate cause of the damage through the fire which was the passive agency, the insurer is held liable for a loss caused by the fire."

IN QUEBEC THE LIABILITY OF THE COMPANY IS EXPRESSLY COVERED BY THE CODE.

Art. 2579. "The insurer is also liable for losses caused by the fault of the servants of the insured committed without his knowledge or consent."

PROPERTY INSURED.

What may be the subject matter of fire insurance is specially provided for in some of the provinces of Canada, (infra Cap. IX, X.) The Ontario Insurance Act, R. S. O., 1897, c. 203, s. 166, reads as follows:—166. "Every company licensed and registered for the transaction of fire insurance may within the limits prescribed by the license and registry, insure or reinsure dwelling houses, stores, shops and other buildings, household furniture, merchandise, machinery live stock, farm produce, and other commodities, against damage or loss by fire or lightning, whether the same happens by accident or any other means, except that of design on the part of the assured or by the invasion of an enemy, or by insurrection." This section has been construed by the Courts as follows:—

The defendants, an insurance company incorporated under the laws of Ontario, insured the plaintiffs a railway company having a branch line in the State of Maine, "against loss or damage by fire... on the property as follows: on all claims for loss or damage caused by locomotives to property located in the State of Maine and including that of the assured." By the statute law of the State of Maine, where "property" is injured by fire

communicated by a locomotive engine, the railway company is made responsible and it is declared to have an insurable interest in the property along the line for which it is responsible:—

Held, that the policy in question was, in consequence of this statutory provision, a valid policy of fire insurance, and not an *ultra vires* policy of indemnity, but that the property in respect of which the insurance attached was that defined by the enabling section of the Ontario Insurance Act, (R. S. O., 1897, c. 203, s. 166) and that standing timber was not included. (89)

DESCRIPTION OF PROPERTY INSURED.

It is only necessary that the description of the insured property should be substantially correct.

The law is thus expressed in the Civil Code of Quebec:

Art. 2572. "It is an implied warranty on the part of the insured that his description of the object of the insurance shall be such as to shew truly under what class of risks it falls according to the proposals and conditions of the policy."

When the application is referred to in the policy as forming part thereof, it will control the provisions of said policy, where there is a variance with respect to the description of the premises insured. (90)

Where the application is made part of the policy by reference, both will be looked at for the purpose of determining the nature and subject matter of insurance. (91)

Where the application correctly described the building in which were contained the goods to be insured, but the plan on the back of the application, which was referred to in the application, incorrectly showed such building, the court held that the maxim *falsa demonstratio non nocet* applied. (92)

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(89) Canadian Pacific Railway Co. *vs* Ottawa Fire Ins. Co., 9 O. L. R., 493; 11 O. L. R., 465; 39 Can. S. C. R., p. 405.

(90) Vezina *vs* Canada Fire & Marine Ins. Co., S. C., 1883, 9 Q. L. R., 65.

(91) Howes *vs* Dominion Fire & Marine Ins. Co., 2 O. R., 89; 8 A. R., 644.

(92) Guardian Ass. Co. *vs* Connelly, 20 Can. S. C. R., 208.

An insurance against fire effected against a certain quantity of coals, covers not only those deposited at the time, but those deposited since, and covers also loss or risk arising from spontaneous combustion. (93)

SUBSTITUTED GOODS.

An insurance upon stock in trade includes in addition to what remains in specie of the original stock at the time the policy is issued, other goods purchased in the course of business to replace what has been sold. (94)

Where a policy of insurance against fire was effected by the owners, wholesale dealers in coffee, etc., on "120 sacks of green coffee" stored in a specified warehouse, and which policy was a renewal of a similar insurance in force for some years, held, that such insurance was not limited to the particular 120 sacks on hand when the policy was effected, but covered similar stock to the specified number of sacks in hand at the time of a fire which subsequently occurred. (95)

QUEBEC JURISPRUDENCE.

The jurisprudence in Ontario is expressly covered by an article of the Code in Quebec, as follows:

Art. 2573. "An insurance upon effects indeterminately as being in a certain place is not limited to the particular effects which are there at the time of insuring, but attaches to all those falling within the description contained in the place at the time of the loss; unless a different intention is indicated in the policy."

In an action for the recovery of the insurance of goods insured under a warehouse receipt, it is sufficient to establish that goods

(93) British American Ins. Co. *vs* Joseph, 9 L. C. R., 448.

(94) Butler *vs* Standard Ins. Co., 4 A. R., 391.

(95) Merchants Fire Ins. Co. *vs* Equity Fire Ins. Co., 9 O. L. R., 241.

of the character and brand and of the quantity claimed were actually in the building where the goods were stored at the time of the insurance, and at the time the building and its contents were wholly burnt, without proving the actual identification of the goods described in the warehouse receipt. (96)

OTHER CASES.

Paper bags for flour not filled, burned, in a mill, would not be covered by a policy upon the flour. (97)

But a policy on a grist mill covers not only the building, but also the fixed and moveable machinery in it. (98)

It was held that a fire policy in favour of a party, on coal oil "his own, in trust, or on consignment," covered his loss on oil destroyed by fire in Middleton's sheds, warehouse receipts for which granted by Middleton in favour of one Ruston had been transferred by Ruston to such party, and on which receipts such party had made advances to Ruston, who obtained such advances really for Middleton, without the party advancing, however, being aware of the fact. (99)

Where a company insures a house, a summer kitchen and shed with all the contents "of said house", and where some of the contents, the coals, are such that their natural place is in the shed, the insurance covers all the goods in the house, even those which have been taken into and belong naturally to the summer kitchen or shed. (100)

"MAIN BUILDING."—WHAT IT INCLUDES.

The London Asylum for the Insane, consisted of one large building and some twenty smaller buildings, the large building

(96) Wilson *vs* Citizen's Ins. Co., Q. B., 19 L. C. J., 175.

(97) Hutchinson *vs* Niagara District Ins. Co., 2 Dig. Ont. Case Law, p. 3356, 3364.

(98) Shannon *vs* Gore District Mutual Ins. Co., 2 A. R., 396.

(99) Stanton *vs* Ætna Ins. Co., Q. B., 1872, 17 L. C. J., 281.

(100) Cie d'Assurance Mutuelle contre le Feu de Montréal *vs* Villeneuve, 1886, M. L. R., 2 Q. B., 89, confirming S. C., 29 L. C. J., 163.

consisting of a central front section, and an L shaped wing at each end. Directly in rear of the central portion were a laundry, kitchen and engine room, consisting of a brick building roofed with slate and connected with the central building by a passage or covered way with brick walls 10 feet high, roofed with slate, and with a tramway to carry food from the kitchen portion to the central building. This rear structure was destroyed by fire. The policy described the insured building as follows: "The Asylum for the Insane, London, main building."

The Court found that the Government intended to insure all the buildings and this fact was known to those who represented th insurance company, and that the words "Asylum for the Insane" included all the buildings used for the housing the insane at London, and that "main buildings" included wings and extensions, as distinguished from the other surrounding and detached buildings. (101)

LOCALITY.

A policy of insurance was effected on goods of the insured in No. 319, and the insurance was afterwards renewed without variation of its original conditions. Before the renewal, the insured had extended his premises into No. 315, and the company's agent visited the establishment and saw the portion of both buildings occupied by the insured, and the goods contained therein. A fire destroyed the goods in No. 315, and slightly injured those in 319. In an action on the policy claiming for the loss, both in No. 319 and in No. 315, the jury found the facts as above stated, and both parties moved for judgment on the verdict. Held, that on the facts found by the jury as above, the judgment should be for the defendants as to the loss in No. 315, the inspection of the premises by the company's agent, before the

(101) Attorney-General of Ontario *vs* Ætna Fire Ins. Co., 18 Can. S. C. R., 707.

renewal of the policy, not being sufficient to establish an agreement to vary the terms of the policy in respect of the locality in which the goods were represented to be. (102)

An insurance on goods described as being in Nos. 317, 319 St. Paul street, does not cover goods in the premises No. 315, adjoining. And a verdict of a jury adverse to this doctrine, although supported by the charge of the judge, will be set aside. (103)

A provision, in the body of the contract defining the locality in which alone the insured property must be found, is perfectly legitimate, and is not open to the objection that it is in effect a condition to the validity of the policy which requires to be contained in the variations to the statutory conditions.

It was held that the words in a fire policy "on the hull and joiner work of the steamer Malakoff (now in Tate's Dock, Montreal), *navigating the river St. Lawrence between Quebec and Hamilton, stopping at intermediate ports*", describing the subject matter of the insurance, imported an agreement that the vessel was navigating and to navigate and that the words must be considered to be a warranty, and the engagement not having been performed, the insurer was discharged. (104)

But it was held in Grant *vs* Ætna Ins. Company, by the Privy Council, that where the description was "now lying in Tate's Dock, Montreal, and intended to navigate the St. Lawrence and lakes from Hamilton to Quebec, principally as a freight boat, and to be laid up for the winter in a place to be approved by this company", these words did not imply a contract to navigate, and that as the assured did not, after the date of the policy, remove the boat for the purpose of navigation, he was not bound to cause her "to be laid up for winter in a place

(102) Citizens' Ins. and Invest. Co. *vs* Lajoie, M. L. R., 4 Q. B., 362.

(103) Rolland *vs* North British & Mercantile Ins. Co., 14 L. C. J., 69.

(104) Grant *vs* Equitable Life Ins. Co., 13 R. J. Q., 264.

to be approved of by the company", and that, although the boat was not laid up for the winter in a place approved of by the company, the insurers were liable for the loss. (105)

A time policy against fire was effected on a steamship. The policy described it as then "lying in the Victoria Docks", but gave it "liberty to go into dry dock, and light the boiler fires once or twice during the currency of this policy". The only dry dock into which the ship could go was Lungley's Dock, at some distance up the river. To go there it was necessary to remove the paddle wheels; they were removed in the Victoria Docks, and the ship was then towed up to Lungley's Dock. The necessary repairs there having been completed, the ship was brought out and moored in the river, preparatory to replacing the paddle-wheels. This operation could have been perfectly performed in the Victoria Docks, but it was found that in such case it was customary, as the more economical course, to replace the paddle-wheels while the ship lay in the river. Before the wheels had been replaced the ship was burnt:—

Held, that the policy covered the ship while in the Victoria Docks, and while passing from them to the dry dock, and while directly returning from the dry dock to the Victoria Docks; but did not cover the vessel while moored in the river for a collateral purpose. (106)

A policy issued in 1895 against loss by fire to the hull of the Steamship Baltic, including engines, etc., "while running on the inland lakes, rivers and canals during the season of navigation, to be laid up in place of safety during winter months from any extra hazardous building."

The Baltic was laid up in 1893 and was never afterwards in commission. In 1896 she was destroyed by fire. It was held, reversing the court below, that the policy never attached, that the steamship was only insured while employed on inland waters

(105) 9 R. J. R. Q., 290.
(106) Pearson *vs* Commercial Union, 1 App. Cas., 498.

during the navigation season, or laid up in safety during the winter months, and that the above stipulation was not a condition but rather a description of the subject matter of the insurance and did not come within sec. 115 of the Ontario Insurance Act relating to variations from statutory conditions. (107)

A policy described the premises in which the insured property was situate as No. 272, it was held that reading together the application, interim receipt and other documents leading up to the issue of the policy, the contract of insurance was intended to cover certain goods situate in the adjoining premises, No 273. (108)

Amongst other conditions endorsed on the policy was one "that if more than 20 lbs. weight of gunpowder should be on the premises at the time when any loss happened, such loss should not be made good."

Held, that the word "premises" though in popular language applied to buildings, yet in legal language meant the subject or thing previously expressed, in this case a vessel; and that the question being, not what was the intention of the parties, but what is the meaning of the words they have used, the reasonable construction of the contract was that the vessel should not carry more than 20 lbs. weight of gunpowder. P. C., 1862. (109)

In the case of Gorman *vs* The Hand in Hand Ins. Co., (110) it was held that when locomotive chattels, such as agricultural implements, carts, etc., are insured in a certain place, the owner cannot recover for them if they are burnt outside the limits of the place named.

The rule above stated with respect to the validity of the provision respecting locality, has not been uniformly adopted in the

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(107) London Assurance Corporation *vs* Great Northern Transit Co., 29 Can. S. C. R., 577.

(108) Liverpool, London & Globe Ins. Co. *vs* Wyld, 1 Can. S. C. R., 604. For the particulars of this case, vide infra, p. 262.

Vide also Wilder *vs* Phœnix Ins. Co., 1 R. de J., 82.

(109) The Beacon F. & L. Ins. Co. *vs* Gibb, 7 L. T., 574; 1 Moo. P. C. n. s., 73.

(110) Ir. R., 11 C. L., 224.

courts of the United States. With respect to this, Joyce says, vol. 2, par. 1742:

"As a rule, locality and place are essential, but in determining how far locality is important in describing the property insured, reference must be had to the character of the property, to a consideration of what is the primary object in effecting the insurance, and also to the fact to what uses the property insured would in all reasonable probability be put. So usage may be a controlling factor in the matter, as may also be the fact, in the case of certain kinds of property, whether the removal thereof is permanent or temporary. Where the policy is upon a class of property the risk upon which, from its particular character, depends so much upon the place or location that the same constitutes an essential element of the contract; as in the case of a stock of goods or furniture 'contained in' a specified building, then such property will, as a rule, not be covered, if changed or removed to another place or locality. The insurer for various reasons in cases of this character might refuse to accept the risk altogether, or might accept it at an enhanced premium if he had known that its location was other than that designated, and the right of the insurer to know exactly what risk he is undertaking cannot be denied. But if the primary object is to insure the property described, and the character of the property is such as to warrant that presumption, then its exact location may be a subordinate matter of more or less importance."

CHAPTER III

INSURABLE INTEREST.

Definition. — Civil Code. — Vendor and vendee. — Mortgagee. Husband and wife. — Indorser. — Warehouseman.

In a very old insurance decision of the House of Lords, (1) insurable interest is thus defined:

"A man is interested in a thing to whom advantage may arise or prejudice happen from the circumstances which may attend it; *in quantum mea interfuit i. e. quantum mihi abest quantum que lucrari potui. Dig. lib.* 46, *lib.* 8, *c.* 13. And whom it importeth, that its condition as to safety or other quality should continue; interest does not necessarily imply a right to the whole, or a part of a thing, nor necessarily and exclusively that which may be the subject of privation, but the having some relation to, or concern in the subject of the insurance, which relation or concern by the happening of the perils insured against may be so affected as to produce a damage, detriment, or prejudice to the person insuring; and where a man is so circumstanced with respect to matters exposed to certain risks or dangers, as to have a moral certainty of advantage or benefit, but for those risks or dangers he may be said to be interested in the safety of the thing. To be interested in the preservation of a thing, is to be so circumstanced with respect to it as to have benefit from its existence, prejudice from its destruction. The

(1) Lucena *vs* Crawfurd, 2 B. & P., New Rep., 269.

property of a thing and the interest deviseable from it may be very different; of the first the price is generally the measure, but by interest in a thing every benefit and advantage arising out of or depending on such thing, may be considered as being comprehended."

The Civil Code defines Insurable Interest as follows; art. 2474:—"A person has an insurable interest in the object insured whenever he may suffer direct and immediate loss by the destruction or injury of it."

INSURED WITH PARTIAL INTEREST ONLY MAY RECOVER THE WHOLE LOSS.

If the insured has an insurable interest when the policy is effected as well as when the loss occurs, a misrepresentation as to the nature of his interest will not invalidate the policy nor will the amount recoverable be limited to his actual insurable interest if his intention was to insure the whole interest in the property. (2)

But if his intention is to insure only a partial interest, he can only recover for so much as he intended to insure. (3)

INTEREST IN LAND.

Where the insured conveyed his property to his father to avoid a pending claim, upon a verbal agreement that the father was to reconvey when the insured wished, it was held that he had an insurable interest. (4)

ADVANCES UPON A VESSEL.

Advances upon a vessel in course of construction under an oral agreement that when the vessel should be launched she

(2) Caldwell *vs* Stadacona Fire Ins. Co., 11 Can. S. C. R., 212 ; Keefer *vs* Phœnix Ins. Co., 31 Can. S. C. R., 144, infra, p. 80.

(3) Castellain *vs* Preston, 11 Q. B. D., 380, infra, p. 80.

(4) Pettigrew *vs* Grand River Farmers Mutual Ins. Co., 28 U. C. C. P., 70.

should be placed in the hands of the one advancing the money for sale, and that out of the proceeds the advances so made should be paid, is an equitable interest which is insurable. (5)

VENDOR AND VENDEE.

A vendor who has agreed to sell for full value has, pending the contract of sale, a perfect right to insure the premises sold. (6)

The insured was an unpaid vendor under an agreement for sale and claimed to recover the full amount covered by the policy, although this exceeded the balance due him from the purchaser, the circumstances of the case being that the plaintiff sold a piece of land to be paid by instalments, verbally agreeing to keep it insured for the amount of the purchase money. At the time of the agreement the property was insured under a policy which was allowed to remain for some time, when a new policy was substituted for it, and nothing was said to the company of the nature of the change in the insured's interest, although at this time the purchaser had paid a considerable amount of his purchase money.

In pronouncing the majority judgment of the Court, Sedgewick, J., says:—"The question in dispute here is whether an unpaid vendor can recover not only his beneficial interest, but the beneficial interest of his vendee as well. I am clearly of the opinion that he can."

And after expressing approval of the judgment in Caldwell *vs* Stadacona, he says:—"Some of the learned judges below seem to have thought the fact that the insured's interests was not disclosed at the time of the insurance vitiated the policy. The authorities are conclusively the other way. Bowen, L. J., in Castellain *vs.* Preston, (11 Q. B. D. 380) says two conditions only are necessary in order to entitle the assured to recover,

(5) Clark *vs* Scottish Imperial Ins. Co., 4 Can. S. C. R., 192.
(6) Gill *vs* Canada Fire & Marine Ins. Co., 1 O. R., 341.

'first, the form of his policy must be such as to enable him to recover the total value; and secondly, he must intend to insure the whole value at the time.'

"It is nowhere a condition of his recovering the whole amount that he must disclose all the parties interested. The law is well laid down in Wood on Fire Insurance, sec. 151

" 'Unless the policy requires that the interest of the insured shall be disclosed, a failure to disclose the nature of his interest or of the existence of a lien or encumbrance thereon, is not a fraudulent concealment, and the policy is operative if the assured in fact has an insurable interest therein.' " (7)

PERSON WITH LIMITED INTEREST MAY INSURE THE WHOLE.

In Castellain *vs* Preston, Bowen, L. J., says:—"It is well known in marine and in fire insurances that a person who has a limited interest may insure nevertheless on the total value of the subject matter of the insurance, and he may recover the whole value, subject to these two provisions : first of all, the form of his policy must be such as to enable him to recover the total value, because the assured may so limit himself by the way in which he insures as not really to insure the whole value of the subject-matter; and secondly, he must intend to insure the whole value at the time. When the insurance is effected he cannot recover the entire value unless he has intented to insure the entire value. A person with a limited interest may insure either for himself and to cover his own interest only, or he may insure so as to cover not merely his own limited interest, but the interest of all others who are interested in the property. It is a question of fact what is his intention when he obtains the policy. But he can only hold for so much as he has intended to insure..... Then to take a case which perhaps illustrates more exactly the argument, let us turn to the case of a mortgagee. If he has the legal ownership, he is entitled to insure for the whole value, but even supposing he is not

(7) Keefer *vs* The Phœnix Ins. Co., 31 Can. S. C. R., 144.

entitled to the legal ownership, he is entitled to insure *primâ facie* for all. If he intends to cover only his mortgage and is only insuring his own interest he can only in the event of a loss hold the amount to which he has been damnified. If he has intended to cover other persons beside himself, he can hold the surplus for those whom he has intended to cover."

The vendee under an agreement to purchase has an insurable interest. (8)

The fact that the owners of an insured building have entered into an executory contract for the pulling down of the building in question and for the sale of the materials to the contractors at a sum very much less than the amount of the insurance is no bar to their right to recover the full amount of the insurance when the building is burnt down before the time fixed by the contract for the transfer of possession. (9)

MORTGAGEE.

A mortgagee of goods has an insurable interest though the mortgagor continues in actual possession. (10)

A mortgagee having insured for an amount to cover both his own and the mortgagor's interest, but without disclosing the fact, is entitled to recover the full amount of the policy. (11)

Where the insured has conveyed the property by an absolute conveyance, although only intended to be as security for an indebtedness, in case of loss he is entitled to recover. (12)

A policy of insurance taken out by a mortgagor in favour of the mortgagee is not invalidated by reason of the equity of redemption being transferred to the mortgagee where the company have received subsequently the premiums from the mort-

(8) Milligan *vs* Equitable Ins. Co., 16 U. C. R., 314.

(9) Ardill *vs* Citizens Ins. Co.; Ardill *vs* Ætna Ins. Co., 22 O. R., 529; 20 A. R., 605. Vide Keefer *vs* Phœnix Ins. Co., supra, p. 80.

(10) Ogden *vs* Montreal Ins. Co., 3 U. C. C. P., 497.

(11) Richardson *vs* Home Ins. Co., 21 U. C. C. P., 291.

(12) Smith *vs* Royal Ins. Co., 27 U. C. R., 54.

gagee with knowledge that the mortgagor's interest in the property had ceased. (13)

A mortgagee of insured premises to whom payment is to be made in case of loss "as his interest may appear", cannot recover on the policy when his mortgage has been assigned and he has ceased to have any interest therein at the time of the loss. (14)

Plaintiff, being a mortgagor in possession of a mill, conveyed it away by a deed, absolute on its face, taking an agreement for a reconveyance on payment of a certain sum which he owed the grantee. Held, that this was in effect a mortgage, and that the plaintiff had an insurable interest. (15)

Plaintiff insured his interest in a house as mortgagee ; the mortgage was afterwards foreclosed, and the property sold under the decree, and purchased by the plaintiff. Held, that his mortgage interest was extinguished by the foreclosure and sale, and that he could not recover for a loss happening afterwards. (16)

HOUSE.

Where a house is owned by the insured, but the land upon which it is erected has been improperly described, he may still recover in case of loss. (17)

INSURABLE INTEREST AT TIME OF LOSS ONLY.

If the insured has no interest in the property covered by the policy when it is issued, the fact that he has subsequently acquired an interest will not entitled him to recover. And a renewal of the policy is merely a continuance of the original contract. (18)

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(13) Wyman *vs* Imperial Ins. Co., 16 Can. S. C. R., 715.

(14) Guerin *vs* Manchester Ass. Co., 29 Can. S. C. R., 139.

(15) Kelly *vs* Liverpool, London & Globe Ins. Co.; Stevens, N. B., dig. 739, (New Bruns.)

(16) Gaskin *vs* Phœnix Ins. Co., 6 All. 429.

(17) Stevenson *vs* London & Lancashire Fire Ass. Co., 26 U. C. R., 148.

(18) Howard *vs* Lancashire Ins. Co., 11 Can. S. C. R., 92.

HUSBAND.

The husband of the owner in fee and tenant by courtesy has an insurable interest. But a tenant of glebe lands continuing in possession after the death of the lessor, and after the induction of his successor, against the latter's will, has no insurable interest, the successor not being bound by the covenant. (19)

INDORSER OF NOTES.

A party to whom a policy of insurance is assigned with the assent of the company as security for his indorsement of the notes of the purchaser of certain chattel property from the assignee of the insured, has an insurable interest. (20)

MARRIED WOMAN.

A married woman being the owner of a stock in trade which is insured in her name, is not prevented from recovering on the policy in case of loss by reason of the fact that the business is carried on in her husband's name with her acquiescence. (21)

A woman common as to property and under coverture cannot validly insure in her own name the household furniture belonging to the community without the authorization of her husband. (22)

A widow having continued for four years after her husband's death, in possession of a house built on land of which he was the lessee for years, and paid the ground rent, insured the house in her own name. No administration was taken out on the husband's estate. Held, that she had an insurable interest, 1st as the presumptive owner of the house; 2nd as executrix *de son tort;* 3rd as the widow under the Statute of Distribution. (23)

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(19) Shaw *vs* Phœnix Ins. Co., 20 U. C. C. P., 170. Vide Caldwell *vs* Stadacona Fire and Life Ins. Co., (infra, p. 131).

(20) Davies *vs* Home Ins. Co., 3 E. & A., 269.

(21) Butler *vs* Standard Fire Ins. Co., 4 A. R., 391.

(22) Rousseau *vs* La Compagnie d'Assurance Royale, M. L. R., 1 S. C., 395.

(23) Lingley *vs* The Queen Ins. Co., 1 Han., 280.

WAREHOUSEMAN.

A purchaser from a warehouseman, under a warehouse receipt, of a quantity of wheat which was never separated from other wheat of the seller, has an insurable interest. (24)

A colourable lease made to an individual for the purpose of constituting him a warehouseman upon whose receipts the goods assured would be dealt with does not affect the risk and void the policy of an insurance upon certain goods *assured whether their own property held on trust or on consignment.* (25)

But where the warehouseman is not such within the terms of the statute and the receipt is ineffective to operate as a warehouse receipt, the purchaser cannot recover. (26)

And where a valid condition of the policy requires that the property must be insured in the name of the owner, if after the policy has issued the property insured is legally transferred by warehouse receipt, the insured cannot recover. (27)

In order to recover upon a policy of insurance upon a quantity of wheat held by the insured under a warehouse receipt, it is not necessary to prove the identity of the wheat destroyed, but the quantity claimed for must have been in the warehouse under the warehouseman's control during the whole period between the insurance and the fire. (28)

CHIROGRAPHARY CREDITOR.

A chirographary creditor has no insurable interest in the stock which is in the store of his debtor, and therefore cannot validly insure it. (29)

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(24) Box *vs* Provincial Ins. Co., 18 Gr., 280.

(25) Lancashire Ins. Co. *vs* Chapman, 7 R. L., 47; confirming Q. B., which reversed S. C., 13 L. C. J., 36.

(26) Todd *vs* Liverpool, London & Globe Ins. Co., 20 U. C. C. P., 523.

(27) McBride *vs* Gore District Mutual Fire Ins. Co., 30 U. C. R., 451.

(28) Parsons *vs* Queen Ins. Co., 29 U. C. C. P., 188.

(29) Hunt *vs* Home Ins. Co., S. C., 3 R. L., 455.

MUTUAL COMPANIES. — MISREPRESENTATION AS TO INTEREST.

Legislation making provision for the incorporation of mutual insurance companies frequently provides that the policy shall be voided where the true title of the assured or any incumbrance on the subject matter of insurance be not expressed in the policy. (30) Decisions based upon such legislation do not affect the general rule above stated.

IN QUEBEC THE NATURE OF THE INTEREST MUST BE SPECIFIED.

Art. 2571. C. C. "The interest of an insurer against loss by fire may be that of an owner, or of a creditor, or any other interest appreciable in money in the thing insured ; but the nature of the interest must be specified."

It was held nevertheless that a *bona fide* equitable interest in property of which the legal title appears to be in another may be insured, provided there be no false affirmation, representation or concealment on the part of the assured, who is not obliged to represent the particular interest he has at the time, unless inquiry be made by the insurer, and such insurable interest in property of which the assured is in actual possession may be proved by parol evidence. (31)

The lessor of real estate insured the leased property "in trust" and notified the insurers that the lessee, his son, was the real beneficiary. The lessee paid all the premiums and the property having been seized in execution of a judgment against the lessor the lessee purchased at the sheriff's sale and became owner in fee. He afterwards increased the insurance, the insurer acknowledging in the second policy, the existence of the first in his favour. The property having been destroyed by fire, payment

(30) Infra, p. 365, 499.

(31) Whyte *vs* Home Ins. Co., 14 L. C. J., 301.

of the amount of the first policy to the lessee was opposed by a judgment creditor of the lessor and the money attached in the possession of the company.

It was held that the lessee having had an insurable interest when the first policy issued, and being, when he acquired the fee and when the loss occurred, the only person having such interest, he was entitled to the payment of the amount of the policy insured upon the application of the lessor. (32)

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(32) Langelier *vs* Charlebois, 34 Can. S. C. R., 1.

CHAPTER IV

THE INSURED.

Definition.—Loss payable to third party.—Assignment of policy. — Subrogation. — Mortgagor. — Mortgagee. — Re-insurance.

The party to be indemnified under a contract of insurance is styled the "insured" or "assured."

In the event of loss the amount payable may, however, by virtue of some transfer by the original insured, with or without the assent of the insurer, and with or without the transfer of the property which is the subject matter of the insurance, be made payable to a third party, and difficult problems are frequently presented with respect to the liability of the company in such cases.

Conditions of transfer.

The conditions under which the transfer or assignment of the monies payable under the policy arise, are the following:

Class 1. Where the policy on its face contains a clause which provides that the loss, if any, shall be payable to some third party;

Class 2. Where, with the consent of the company, there is an assignment of the policy of insurance to a third party, having an insurable interest in the property insured, as a collateral security to a debt due by the assignor to the assignee;

Class 3. Where, with the consent of the company, there is an absolute assignment of the policy to a third party, who has also an insurable interest in the property insured, and the assignor retains no interest in the said property;

Class 4. Where, without the consent of the company, there is an assignment of the policy to a third party, having an insurable interest in the property insured, as collateral security to a debt;

Class 5. Where, without the consent of the company, there is an absolute assignment of the policy of insurance to a third party who also has an insurable interest in the property insured;

Class 6. Where, with the consent of the company, there is an absolute assignment of the policy to a third party, without any such insurable interest; and

Class 7. Where, without the consent of the company, there is an absolute assignment of the policy to a third party, without any such insurable interest.

Classes 1 and 2. Where the policy makes the loss payable to a third party, such third party is liable to have his claim destroyed by a breach of the conditions on the part of the original assured.

Although having the authority against it of a decision in 1865 of the old Court of Chancery for Upper Canada, it is submitted that there is no distinction in principle between the case of an assignment of a policy of insurance to a mortgagee by his mortgagor as collateral security for the mortgage debt, and the case of a policy on its face made payable to the mortgagee, and in both cases the policy will be voided by a breach of a condition by the mortgagor which, had there been no assignment, would have voided the policy.

It will facilitate an understanding of the subject to discuss the first two classes together, and to deal in the first place with

the second class, which was considered by the Ontario courts previous to the first class.

An early and much litigated case, of Burton *vs* Gore District Mutual Insurance Co., (1) has frequently been the subject of discussion in later cases, and although stated by Burton, J., (2) to be a decision affirmed by the Court of Error and Appeal, and therefore binding upon the courts in Ontario, there appears to be no record in the reports, of the case ever being carried beyond the Court of Chancery. This decision is a very unsatisfactory authority and one which, in view of later decisions, it is submitted, would not be approved by a higher court. The facts and history of the case were as follows:—The insured having mortgaged his property, with the consent of the insurance company, assigned the policy to the plaintiff and in an action brought thereon by the mortgagee, the company pleaded that after the assignment the plaintiff had effected an insurance in another company without their consent, whereby the policy became void.

The case first came before the Court of Queen's Bench. (3) The defendants' third plea was that the mortgagor before the loss, insured in another office for £500, which defendants had no notice of, and never consented to or approved. On demurrer this plea was held good. Chief Justice Robinson, referring to the third plea says:—"I take the third plea to be a good defence, for the plaintiffs themselves in their declaration have stated the assignment made to the plaintiffs by M. to be merely for securing a debt, and to be subject to an equity of redemption in M. Now this being so, M. stands still as the person assured, with only a lien given by him to the plaintiffs upon his policy..... and while he held still all the interest in the policy above the amount of the mortgage, for that at least he must have held, according to the statement in this plea, he effected another insur-

(1) 14 U. C. R., 342; 12 Gr., 156.

(2) Mechanics Building Society *vs* Gore District Mutual Ins. Co., 3 A. R., 151.

(3) 14 U. C. R., 342.

ance in another office, and without the knowledge of the defendants at the time, and without obtaining their assent and confirmation subsequently. Such double assurance in my opinion avoided the policy, for it was clearly within the mischief intended to be guarded against by that condition; since if M. could pay his debt out of the first policy in case of loss, and receive for himself the residue of the sum insured, and also any other sums that he might have insured in other offices without the defendants' knowledge, exceeding in all the value of the property, he would have the temptation to act fraudulently, which this condition in the policy was intended to remove from him."

Burn, J., on page 361 also deals with the effect of the assignment, and says:—"The condition is not in case the person holding the policy, whether he may be the original insurer or the assignee who may effect a subsequent insurance, that the first policy shall be void, but it is in case of subsequent insurance without notice that the policy shall be considered void; leaving the matter to rest upon the footing, that if any interest which the company had insured might be again insured, the company should have notice of it."

Again on page 362, he says:—"It appears to me that reason and common sense dictate we should hold that the stipulation or condition that the policy should be void in case of a subsequent insurance, did not by the defendants' sanction of the transfer to the plaintiffs become divisible, and so leave M. to effect another insurance upon his interest as mortgagor without giving notice."

Again he says:—"I do not think the transfer of the policy altered the nature of it; that is, that because the plaintiffs became mortgagees of the property the policy then became an insurance of the debt due them. By the transfer no doubt it operated in the nature of an additional security to them for their debt, but it did not alter the nature of the policy itself."

And after reasoning the matter out he further states:—"This shews that the mortgagor and mortgagees were jointly interested in the policy, and that their interests had not become distinct so as to absolve the mortgagor from an obligation to the

defendants to give notice of a subsequent insurance, or to render the mortgagees so independent of the acts of the mortgagor as to be bound by nothing he might do."

McLean, J., concurred with Burn, J.

The same case came on to be heard in the Court of Chancery, (4) where VanKoughnet, C., says:—"Whatever difficulty a court of law might have felt in dealing with the divisible interests of mortgagor and mortgagee, no such difficulty exists here. I think the mortgagor, by the subsequent insurance, only destroyed his own interest in the policy, leaving that of the mortgagee unaffected; and that if the latter could at law, as alienee, recover the whole amount of the policy, this court would restrain him from taking more than his own interest in it, and thus prevent the frauds and the difficulties which the court at law seemed to apprehend would arise from treating the mortgagee as the owner there of the policy, as well as its alienee."

The case was reheard before the full court and affirmed where the Chancellor's view was concurred in by Mowat, V. C., who held that by virtue of the assignment the assignee became thence forward, in equity, if not in law, the assured. He says:—"If the assignee is not the purchaser of the property insured, he is a creditor merely of the owner, and taking the assignment as a mortgagee he becomes the assured to the extent of his debt only. This being in the present case the mutual relation of the plaintiffs and the company, the question is whether the subsequent insurance by the mortgagor avoided the contract? To hold in equity that it did would in my opinion be opposed to the spirit of the whole law of insurance."

Spragge, V. C., on the other hand, dissented, holding that the mortgagees were simply the assignees of a contingent interest subject to the same liabilities and contingencies which attached to it in the hands of the assignor.

This decision was discussed by Gwynne, J., in Smith *vs* Nia-

(4) 12 Gr., 156.

gara District Insurance Co., (5) where he says, p. 576:—"I confess that if it were not for this decision, which, so far as I have been able to find, is not based upon the authority of any decided case, I should have thought it beyond doubt that consent to the assignment of a policy of insurance having legal existence involved in terms a necessity for the continuing existence of the thing assigned — namely, the legal contract — although it may be in whole or in part only for the benefit of the assignee; and that, like the assignment of any other chose in action, the assignee acquired no greater right to recover thereunder than was consistent with the terms of the contract, and as could be asserted by or on behalf of the assignor, the only difference between the position of the assignee at law and in equity being, that in equity he could sue in his own name, whereas at law he could only sue in the name of his assignor; but, whether in equity or at law, he could only recover in right of the assignor. I cannot understand how a party's consent to the assignment by one person to another of a legal contract in existence with the former can operate as the destruction of the thing agreed to be assigned, and the substitution in its stead of a wholly new contract having no legal existence, but having a new birth in equity, wholly relieved and discharged from those conditions and safeguards which, for the protection of the party assenting to its assignment, surrounded its legal existence."

In Kanady *vs* Gore District Mutual Insurance Co., (6) the court of Queen's Bench, in the judgment delivered by Gwynne, J., has this to say with respect to the decision in Burton *vs* Gore District:—"I have searched in vain to find a case, and I venture to affirm that none can be found, wherein it has been decided in any English Court that a mortgagee of property upon which a policy of insurance had been effected by the owner and mortgagor and which policy has been assigned to the mortgagee as collateral security for his mortgage debt, can, in case of a loss

(5) 38 U. C. R., 570.
(6) 44 U. C. R., 261.

occurring, recover the amount secured by that policy, or any part thereof, otherwise than in right of the insured mortgagor, and subject to the conditions contained in the policy. In England such an assignee is regarded the assignee of a chose in action only, and as such he is entitled to recover only in right of the insured, and subject to the conditions contained in the policy. This also appears now to be well established law, as the same is administered in the Supreme Courts of the States of Massachusetts and Pennsylvania, and in the Supreme Court of the United States.....

"However, Burton *vs* The Gore District Mutual Insurance Company, could not, as it appears to me, irrespective of recent legislation, govern in any case except in one precisely similar in its circumstances, that is to say, where the premium note of the original insured is given up and cancelled, and a new premium note is given by the mortgagee to whom the policy is confirmed anew by the insurers. That was the state of the facts upon which that case proceeded, and any authority which it may have if any it has in view of recent legislation, must be confined to cases in which the same state of facts appears."

The decision in this case was also discussed in Livingstone *vs* The Western Assurance Co., (7) which was a case under class one, namely, where instead of an assignment, the loss on the face of the policy was made payable to the mortgagee. (8)

The only judges who expressed any opinion upon the decision in Burton *vs* Gore District Mutual were the following:

Draper, C. J., said:—"I should add that I have considered the case of Burton *vs* Gore Mutual Insurance Co. The fact that there was an assignment in that case may be sufficient to dis-

(7) 14 Gr., 461; 16 Gr., 9.

(8) This case was heard by the Court of Error and Appeal, consisting of Draper, C. J., Richards, C. J., VanKoughnet, C., Hagarty, C. J., Spragge, V. C., A. Wilson, J., Mowat, V. C., and Gwynne, J., although Mowat, V. C., was absent when judgment was pronounced.

tinguish it, but if not, it would require more consideration than I have yet given to it before I could follow it to the extent necassary to decide this case in favour of the plaintiff."

Spragge, V. C., (who heard the case in the first instance) said that in disposing of it originally he had proceeded mainly on the case of Burton *vs* Gore District, from which he had found it impossible to distinguish the case, and subsequent consideration had failed to convince him that he was wrong.

VanKoughnet, C., who was present at the rehearing in the full court of Chancery, (9) had found in favour of the defendants, and said:—"It is not like the case of Burton *vs* The Gore District where the policy was assigned with the assent of the insurance company, so that from that time forward the assignee, as to a certain interest, became the party assured. Here the rights of the parties are declared *ab initio* by the contract itself, and no subsequent arrangement took place between them to alter these rights."

While Mowat, V. C., says:—"I think that the case cannot in principle be distinguished from Burton *vs* The Gore District Mutual, and that the plaintiff being, to the extent of his interest, the assured, he was not prejudiced by any act of his mortgagor to which he was no party."

In the result, therefore, it would appear that Robinson, C. J., Burn, McLean and Gwynne, JJ., and Spragge, V. C., were of the opinion that the assignment of the policy as security for the mortgagee's debt, still left the policy liable to be voided by the acts of the mortgagor ; while VanKnoughnet, C., and Mowat, V. C., are authorities for the contrary proposition and Draper, C. J., expresses doubts as to the judgment of the Court of Chancery. The remaining judges of the Court of Error and Appeal simply concurred in holding that where the policy on its face makes the loss payable to the mortgagee, he stands in no better position than the mortgagor.

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(9) 14 Gr., 461.

In addition ws have the fact that Vice-Chancellors Spragge and Mowat, express the opinion that there is no distinction in principle between the case where the policy is assigned as collateral security to the mortgagee, and the case where the policy on its face is made payable to the mortgagee.

Osler, J. A., with respect to the rights of the parties, in Class 1, states the law as follows: (10)—"It is well settled that in a policy, by the terms of which the mortgagor is the party insured and with whom the company contract, a clause by which the policy moneys are made payable to the mortgagee in the event of loss, does not create an insurance of his interest so as to enable him to recover upon the policy *qua* an insurance contract with him, but is a mere appointment of the mortgagee to receive any moneys which may become due from the insurers in the event of loss, and a direction and authority to the latter to pay him instead of the mortgagor: (Livingstone *vs* Western Insurance Co., in App. 16 Gr. 9).

"The immediate contract of the insurers being with the mortgagor, he is the party entitled to sue upon the policy, and may recover the amount if unpaid, notwithstanding the direction or authority to pay to the mortgagee: (Caldwell *vs* Stadacona Insurance Co., 11 S. C. R. 212.)

"The mortgagee's claim is, nevertheless, liable to be defeated by the mortgagor's breach of the conditions of the policy : Livingstone *vs* Western Assurance Co.; (11) Chishom *vs* Provincial Insurance Co." (12) The jurisprudence in Quebec is to the same effect. (12a)

Right of action in cases under class 1.

The Ontario cases were reviewed by the Court of Appeal in the Agricultural Savings & Loan Co. *vs* Liverpool & London & Globe, (13) with respect to the mortgagee's right of action.

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(10) Mitchell *vs* City of London Ass. Co., 15 A. R., 262.
(11) 16 Gr., 9.
(12) 20 U. C. C. P., 11.
(12a) Migner *vs* St. Lawrence Fire Ins. Co., Q. R., 10 K. B., 122.
(13) 3 O. L. R., 127.

In that case Armour, C. J. O., in pronouncing the judgment of the court, held that a policy of insurance by deed, is a deed poll, and anyone named or designated in it, with whom a covenant is thereby made, can sue upon it.

A different view was, however, expressed in the Supreme Court of Canada, in the case of McQueen *vs* Phœnix Mutual Insurance Co. (14) There, Gwynne, J., with whom Strong, J., concurred, says:—"The policy, although having in it the words 'loss if any payable', etc., etc., is granted to the plaintiff. He is the person named therein as the insured, he is the person with whom the defendants contract, with whom the defendants covenant to make good all loss or damage to be sustained by the peril insured against, and the words 'loss if any payable', etc., etc., operate to enable the defendants, in fulfilment of that covenant to pay the parties named, and to set up such payment to an action by the plaintiff against them for breach of this covenant, but if they do not pay them or any one, then, if loss has been incurred within the terms of the policy, a breach of their covenant is committed, and the plaintiff is the person in whom the right of action for such breach is vested — he is the proper person to sue."

And again, in Guerin *vs* Manchester Fire Insurance Co., (15) a case governed by the law of the Province of Quebec, Strong, C. J., in pronouncing the judgment of the Court, says:—"According to the rule of law established in England, a person not himself a party to a contract, but to whom money is made payable under a contract entered into by other persons, cannot maintain an action to recover the money so made payable to him, and this rule prevails generally in the United States with the exception of the State of New York, where the decisions have established a contrary rule. According to the modern law of France, however, the *adjectus gratiâ solutionis* can maintain an action in his own name where the payment is intended for his benefit. Therefore, had the mortgagee retained an interest

(14) 4 Can. S. C. R., 660.
(15) 29 Can. S. C. R., 139.

in the mortgages up to the time of the loss, he might have maintained an action for the insurance money though it was payable to him under a contract of insurance between the mortgagor and the company to which contract he was himself no party, and this right of action he might have transferred to the appellant. The right to maintain an action in the character of a mere party to receive payment would, however, depend on a due performance of the condition of the policy by the assured, who, in the hypothesis now being considered, would be the mortgagor."

When Liverpool, London & Globe *vs* Agricultural, etc., reached the Supreme Court, (16) the court refrained from expressing any opinion upon the question of the right of the mortgagees to bring an action in their own name, as they held the policy never attached owing to misrepresentations contained in the application.

In the result, therefore, while it may be laid down as finally settled by authority that in a case where by the policy the loss is made payable to a third party, such third party's claim nevertheless may be destroyed by a breach of the conditions on the part of the original insured, yet, until there has been some authoritative decision on the point binding upon the provincial courts of Canada, it cannot be said to be definitely settled that under such conditions an action is properly brought in the name of the third party without the intervention of the original insured. (16a)

Class 3. Where, with the consent of the company, there is an absolute assignment of the policy to a third party who has also an insurable interest in the property insured, but the assignor retains no interest in the said property.

In this case, where the company consent to the complete alienation of the subject matter of the insurance, coupled with an assignment of the policy, the assignee of the policy becomes the assured and is not affected by any subsequent acts of the

(16) 33 Can. S. C. R., 94.

(16a) Vide also Brush *vs* Ætna Ins. Co., 1 Old., 459, and Maritime Bank *vs* Guardian Ass. Co., 19 N. B. Rep., 297.

assignor. Spragge, V. C., says in Burton *vs* Gore District Mutual, (17) "Where there is an alienation within the meaning of the act, assented to by the company, the company does, I apprehend, accept the alienee in place of the party originally insured; and it would follow that a subsequent insurance in another office by the latter, would not affect the alienee."

Class 4. Where, without the consent of the company, there is an assignment of the policy, to a third party, having an insurable interest in the property insured, as collateral security, to a debt.

It would appear that the rule governing cases arising under class 2, also applies to this class.

In Burton *vs* The Gore District Mutual, it was held by Spragge, V. C., (18) that in a case of this class, unless the policy so required,the consent of the company was not necessary, making use of the following language:—"Does a consent to such a transfer (partial) involve the same consequence? (as in the case of a total alienation, class 3 above). The reason for requiring consent does not exist in such a case, and looking at the true nature of the transaction I cannot think that B. and S. (the mortgagees) could be looked upon as substituted for M. (the mortgagor) but that M. continued the insured. The consent of the company was asked. I should say, *ex abundanti cautela,* and was given as a matter of course as in a case in which there was nothing requiring any exercise of judgment and in which there was no idea of making any contract of insurance with B. and S. (the mortgagees.)"

Class 5. Where, without the consent of the company, there is an absolute assignment of the policy to a third party having an insurable interest.

At common law an assignment of this character would not be valid, but it would be enforceable in equity.

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(17) 12 Gr., at p. 161.
(18) 12 Gr., at p. 161.

In Burton *vs* Gore District, (19) Robinson, C. J., said:—"At common law clearly no contract of that nature entered into by one person with another, could be assigned to a third party. Like bonds and covenants for some other purposes, they have been and constantly are assigned by arrangements between parties; but the common law does not recognize such assignments as transferring any legal interest to the assignee that can enable him to sue in his own name, though it so far recognizes the assignment as to give facility and protection to the assignee in enforcing the contract for his own benefit, but in the name of the original obligee or covenantee. In the Sadlers' Company *vs* Badcock, (2 Atk. 557) Lord Hardwicke noticed that in Lynch *vs* Dalzell (3 Bro. Parl. Cas. 477), Lord King had laid it down that policies for fire insurance are not in the nature of them assignable, nor intended to be assigned from one person to another without the consent of the office (Park on Insurance, 449), by which I take it undoubtedly to be meant, that without the consent of the insurers policies of insurance against fire were not by law allowed to be in effect transferred (to say nothing of legal negotiability); that is, that they could not be enforced for the benefit of a third party in the name of the person who obtained the policy, and so were less susceptible of assignment than other special contracts; and for this there was no obvious reason."

Class 6. Where, with the assent of the company, there is an absolute assignment of the policy to a third party, having no insurable interest.

In Mechanics Building Society *vs* Gore District Mutual Ins. Co., (20) Burton, J. A., appeared to think there was a distinction between the case of the assignment of a policy with the consent of the company, to a party having no insurable interest in the property insured, and as to whom therefore it might well be held that the policy was liable to be defeated

(19) 14 U. C. R., 351.
(20) 3 A. R., 151.

by any violation of the conditions on the part of the original insured, and the case, as in Burton *vs* Gore District, where the policy was a transfer to mortgagees whose insurable interest was unquestionable and with the full concurrence of the company.

Class 7. Where, without the consent of the company, there is an absolute assignment of the policy, to a third party, without any such insurable interest.

The Court of Appeal for Ontario has held, (21) that a policy of insurance on chattels like any other chose in action, may be absolutely assigned to a party who has not at the time of the assignment, nor at the time of the loss, as to part of the chattels, any interest whatever in the property insured, and that the assignee in his own name can recover on the policy to the extent of the loss sustained by the assignor. In his reasons for judgment the facts are thus stated by Osler, J. A.:—"McPhillips became mortgagee of *certain* of the chattels insured by the policy, and so continued up to the time of the fire. The defendants' contention is that their assent was necessary to the assignment of the 29th of July, 1893, and that as the plaintiff had no interest in the chattels at that date, there was a severance between the ownership and the policy, and so nothing passed by the assignment, and the policy as to the chattels came to an end.....

"It was no more than an assignment of a chose in action to which no consent by the insurers was necessary. McNulty (the assignor) remained the insured, but he provided thereby that the loss, if it occurred, should be payable to some one else who was in fact his own creditor. No case in our law was cited which forbids that to be done. The assent of the insurers is essential only where the policy is assigned to accompany a sale of the property insured, and a new contract of insurance is intended to arise between the purchaser and the insurance company."

In all the reported cases in England and Canada, prior to this one, where an assignee of a policy of insurance has obtained the

(21) McPhillips *vs* London Mutual Ins. Co., 23 A. R., 524.

assistance of the court to recover from the insurance company the amount due to the assignor, it will be found that the assignee at the time of the transfer of the policy and at the time of the loss had an insurable interest in the property insured.

The right of the assignee is thus expressed by Warren on Choses in Action, p. 73:—"Marine insurance policies were assignable by the custom of merchants; but, presumely, a policy of insurance against fire was formerly not even assignable in equity. It seems to have been considered that fire policies were personal contracts and contracts of indemnity only, and that the consent of the insurers was always necessary to the assignment thereof. And the insurance companies and similar individuals seem from the earliest times to have been careful to prevent fire policies from being assigned without express licence by inserting conditions to that effect in the body of the policy. Yet it is submitted that, apart from express restrictions to the contrary in the policy itself, there appears to be no reason why a fire policy should not be assignable in equity as readily as a marine or life policy."

The author here is obviously referring to an assignment of the policy where accompanied by a transfer of the insured property, because he proceeds:

"The policy, if assigned at all before the loss, must be assigned with the property which it covers; such assignment will operate only by consent of the insurers, and the insurers will not consent without proof of the assent of the original assured."

The McPhillips case is opposed to an early Ontario decision of Hazzard *vs* Canada Agricultural Ins. Co., (22) in which it was held that where a policy of insurance covering buildings and chattels was assigned absolutely to the mortgagees of the land who had no interest in the chattels, but who after loss re-assigned the policy so far as the chattels were concerned to the original

(22) 39 U. C. R., 419.

mortgagor who was then and always had been the owner thereof, the latter could not succeed in an action because he had no higher rights than the mortgagees who held the policy at the time of the loss and who having no insurable interest, could not have recovered. In this case the insured obtained a policy which covered his buildings to the extent of $100 and his chattels to the extend of $700, and assigned the entire policy to a loan company holding a mortgage on his real estate, with the nominal consent of the insurers. The insurers paid the Loan Company the amount insured on the buildings, but refused to pay the loss on the chattels, and the Loan Company thereupon assigned the policy to the plaintiff, the original insured. The defendants pleaded to the action that the Loan Company were not, at the time of the loss, interested in the chattels. In pronouncing judgment, the court said:—"The subjects of the policy are divisible. The Loan and Agency Company had nothing to do with the chattel property, nor with the insurance on it. The general assignment was probably made from want of knowledge, or from inadvertence on the part of those who were concerned in it. The Loan and Agency Company never had a right to it, and never claimed any interest in it, but as trustees for the plaintiff. Still, if they got such portion of the money as trustee for him, they might have retained the residue of their claim against him out of it.

"The case is really this: the plaintiff had, although the assignment of the policy was absolute in form, the right or equity of redemption of the policy. The actual nature of the Loan Association's interest in the policy was not mentioned in the assignment, nor, so far as we see, notified to the defendants before the fire. If it had been, there would have been no difficulty about it. The plaintiff, I think, has no answer at law, independently of the late insurance statute, to the fourth plea...

"Can the plaintiff properly reply, under the 38 Vic. ch. 65, sec. 1, O., that there is any reason, from the facts herein mentioned, that it would be inequitable that the insurance should be

deemed void merely because he did not notify the defendants that the interest of the Loan Association was not an absolute one, but conditional only as security for the payment of the mortgage, and that it was not for the whole sum of $900 insured, but was upon the building only, and for $100; but that the defendants knew of all these facts soon after the loss by fire, and never objected to the claim made by the plaintiff under the policy for that cause; and can he shew the Court or a Judge that such a replication would be a sufficient answer to the plea?

"After the fire, the defendants' adjuster, forgetting the policy had been assigned, endeavoured to settle with the plaintiff for $75 in full. The plaintiff says, as I understand, he thought the defendants were also to pay the Loan Association $100 on the building. That settlement, such as it was, fell through, because the adjuster had it called to his mind that the plaintiff had assigned the policy to the Loan Association, and he was not the person to receive the money. The defendants afterwards proposed to pay the $100 to the Loan Association on the building, and to hold the plaintiff to the receipt he had given. They never admitted his claim to anything. I cannot say the Loan Association never intended to claim anything beyond the $100 upon the building. They had the legal right, so far as the plaintiff was concerned, to do so; but they were prevented from doing it, because they were not interested in the chattel property.

"I do not see anything inequitable in the defendants saying to the plaintiff that he had no claim on them, because he had no interest whatever in the policy, having given his whole interest in it, both at law and in equity, so far as the company knew, to the Loan Association; nor do I see anything in the subsequent dealings between the different parties concerned which make it inequitable of the defendants to set up that condition as a bar to the action; nor do I see anything inequitable on the part of the defendants to entitle the plaintiff to relief under the statute.

"I think, upon the fourth plea, the defendants are entitled to retain their verdict, and that the plaintiff cannot, under the circumstances, plead any replication to it, under the statute or otherwise, which would be in any way serviceable to him."

38 V. c. 65, s. 1, (O.), referred to in the judgment above provides for relieving the insured for non-compliance with the strict terms of the policy respecting proofs of loss. Infra, p. 441. (23)

UNITED STATES DECISIONS.

It has also been held in the United States that the assignee of a policy, the assignment of which was not assented to by the company, could not recover in an action where, at the time of the fire, he had no interest in the insured property.

In Peabody and Riggs *vs* The Washington County Mutual Ins. Co., (23a) it is said:—A policy of insurance is a contract of indemnity, and without an interest in the subject of insurance, at the time of the fire, the holder of the policy sustains no loss.

Hence an assignment of a policy as collateral security for the payment of a sum of money by the assignor, will not enable the assignee to maintain an action on the policy, in case of loss; where it does not appear from the complaint that he had, at the time of the fire, any interest in the property insured.

But where the assignor remains the owner of the property, until the time of the fire, the whole loss is sustained by him. He continues the owner of the policy, subject to the title of the assignee to it for the payment of his debts, and, it not being available to the assignee, the assignor alone may recover upon it, to the extent of the loss.

The Court said:—"The plaintiff Peabody, according to the allegations in the complaint, under assignments of the policy of insurance, made with the consent of the defendants, and by virtue of an understanding with the plaintiff Riggs, to whom the policy was issued — all of which took place before the loss— holds the policy as collateral security for the payment to him by Riggs of $400. But it does not appear by the complaint that he had at any time any interest in the property insured, and this is

(23) Assignment of policy without Company's assent to party having insurable interest and against condition.

Vide Salterio *vs* City of London Ins. Co., 23 Can. S. C. R., 32.

(23a) 20 Barb., 339.

fatal to his right to recover. A policy is a contract of indemnity, and without an interest in the subject of insurance, at the time of the fire, the holder of the policy sustains no loss."

If the decision in McPhillips *vs* The London Mutual is good law, it would appear that policies of fire insurance are capable of transfer like certificates of stock, bonds, warehouse receipts, and the holder thereof may recover in an action brought in his own name if the original insured could have so recovered.

COVENANT TO INSURE.

It has been held that a covenant to insure for the benefit of an incumbrancer operates as an equitable assignment of the policy of insurance when effected. Therefore, where a mortgagor enters into such a covenant, it is not necessary, in the interest of the mortgagee, that an assignment of the policy or interim receipt should be actually made; it is sufficient if the insurers in case of loss have notice of the fact before settling with the mortgagor; and if after being notified of the rights of the mortgagee they pay over the insurance money to the mortgagor or a transferee of the receipt or policy, they do so at their peril; and such payment will be no answer to a suit at the instance of the mortgagee. (23b)

Where a policy of fire insurance, not containing any mortgage or subrogation clause, nor any direct agreement with the mortgagee, is effected by a mortgagor pursuant to a covenant in the mortgage, and by the policy the loss, if any, is made payable to the mortgagee as his interest may appear, an appraisement of the loss under statutory condition 16 of the Insurance Act, R. S. O. 1897, c. 203, s. 168, is, in the absence of fraud or collusion, binding on the mortgagee, although he has not been consulted in, nor notified of, the appraisement. (23c)

(23b) Greet *vs* Citizens Ins. Co., 5 A. R., 596; 27 Gr., 121.

(23c) Haslem *vs* Equity Fire Ins. Co., 8 O. L. R., 246.

MORTGAGEE'S POWER TO DEFEAT MORTGAGOR'S POLICY.

In New Brunswick, an undisclosed insurance effected by a mortgagee without the knowledge of the morgagor will void a subsequent insurance made by the mortgage.

The plaintiff had given a mortgage on his property in which he covenanted to insure for the benefit of the mortgagee and that in the event of his not doing so, the mortgagee had authority to insure the owners' interest, to charge the premiums to them, and in case of loss pay himself out of the insurance moneys. At one time the plaintiff had kept up insurance for the benefit of the mortgagee, but had ceased to do so for some years, and the mortgagee insured the property in the plaintiff's wife's name, for his own benefit. The plaintiff then applied for and obtained insurance in the defendant company and the application signed by him stated that there was no other insurance, and that there was no mortgage on the property. The jury found that the application had been filled out by the company's agent and that he did not ask the plaintiff as to the mortgage, and that the plaintiff honestly believed there was no other insurance upon the property. In setting aside the verdict entered for the plaintiff, the court held that the plaintiff knew of the covenant to insure for the benefit of the mortgagee contained in his mortgage, and that there was no difference between an insurance effected by the plaintiff himself and one effected on the same property by his authority and at his expense, and on the same interest, and that it was immaterial in such case whether the plaintiff in fact knew of the insurance effected by the mortgagee or not. (24)

In Ontario, the contrary is the law.

The plaintiff insured his barn in the defendant company for $2,100, and afterwards mortgaged his farm, including the barn, to a loan company, for $1,500, assigning the policy to the company as collateral security. The mortgage purporting to be un-

(24) Perry *vs* Liverpool & London & Globe Ins. Co., 34 N. B. Rep., 380.

Vide also Mackay *vs* The Glasgow & London Ins. Co., M. L. R., 4 S. C., 124.

der the Short Form Act, contained a covenant that the mortgagor would insure the buildings, unless already insured, for not less than $1,000, provided that the mortgagees might themselves effect such insurance without any further consent of the mortgagor. Subsequently, without the knowledge or consent of the plaintiff, the policy was cancelled, and the mortgagees effected a new insurance in another company for the sum of $600. The property having been destroyed by fire the plaintiff notified the company, when they denied liability on the ground that the policy had been cancelled, and on the plaintiff afterwards offering to supply proofs of loss, if required, the company again denied any liability on the ground of cancellation, saying nothing as to furnishing proofs of loss.

In giving judgment, Boyd, C., said:—"I do not see that the defendants can avail themselves of the unauthorized acts of the Loan Company as against the plaintiff. That insurance company must be taken to know that they had not validly cancelled the contract sued upon by a transaction with the Hamilton Company, and it is not proved that the plaintiff knew of or sanctioned the subsequent insurance with the Phœnix appearing in his name. There was, therefore, no second or subsequent insurance put upon the property, for which the plaintiff is responsible.....

"The plaintiff's interest in the policy he effected is not to be defeated by the wholly unauthorized act of a stranger effecting a second insurance in his name without his knowledge." (25)

MORTGAGOR AND MORTGAGEE.

British Columbia, Alberta and Saskatchewan.

The Revised Statutes of British Columbia, c. 82, s. 3, provides: — "Where the loss (if any) under any policy has, with the consent of the company, been made payable to some person or persons or company other than the assured as mortgagee or mortgagees, said policy shall not be cancelled, altered or other-

(25) Morrow *vs* Lancashire Insurance Co., 29 O. R. 377, 26 A. R., 173.

wise dealt with by the company upon the application of the assured, and in any case not without reasonable notice to the said mortgagee or mortgagees."

Substantially the same provision is in force in the Provinces of Alberta and Saskatchewan. (26)

In British Columbia, in 1895, an amendment was also made to the Fire Insurance Policy Act, to the following effect:—"In cases where the loss under any policy is, with the consent of the company, made payable to a mortgagee or mortgagees, proof of loss under any such policy may be made by such mortgagee or mortgagees."

But this provision was repealed in the following session of the Legislature. (27)

Subrogation. — ONTARIO.

An assurance company which pays the assignee of a policy of insurance the amount of his loss and claims that as regards the original insured no liability exists by reason of some breach by him of the conditions of the policy, is entitled to an assignment of the securities held by the assignee of the policy upon payment of the amount due such assignee by the assured.

In Burton *vs* The Gore District Mutual, (28) the particulars of which are set out, supra, pp. 89, 92, 98, 99. Van Koughnet, C., said:—"We are of opinion that the Insurance Company is entitled to an assignment and to the benefit of the mortgage held by the plaintiffs on paying them the insurance money. The mortgagor has acted in breach of the conditions on which his insurance was effected, by effecting another insurance on the premises after his assignment of the policy of the company to the plaintiffs. We hold that the plaintiffs ought not to suffer from this act;

(26) Cons. Ordinances of the North West Territories, ch. 113, sec. 3.

(27) 59 Vict. (B. C.), ch. 20, sec. 2.

(28) 12 Gr., 170.

but neither should the defendants, the company, as against Montgomery, the insurer, if they can make good against him the money payable by them to the plaintiffs. He could not have recovered against them on the policy; and it is but right that he should be compelled to make good what they are obliged to pay to his innocent assignee. This is not the case of a life policy."

Where it is desired that a third party should be indemnified against loss by reason of a breach of the conditions of the policy by the assured, a special contract is usually prepared between the insurance company and such third party which is attached to the policy, whereby it is agreed that "the insurance as to the interest of the third party only therein shall not be invalidated by any act or neglect of the assured, nor by the occupation of the premises for purposes more hazardous than are permitted by the terms of the policy."

The same agreement also provides that if the company shall pay the third party any loss under the policy and shall claim that as to the assured no liability therefor existed, the company shall at once and to the extent of such payment, be legally subrogated to all the rights of such third party under any and all securities held by such party for the payment of said debt.

The question of the liability of the company upon the policy in contracts of this sort, is usually raised in an action by the insured to have the amount paid by the insurance company credited upon the mortgage or other security given to the third party and assigned to the company.

The rights of the parties are thus clearly stated by Burton, J. A. (29)
where he says:—"As between the insurance company and the mortgagee the contract became in effect to all intents one of insurance of the mortgagees' interest, but as between the mortgagor and the insurance company the contract remained as if no such agreement existed, and the right therefore of the in-

(29) Bull *vs* North British Canadian Investment Co., 15 A. R., 421; S. C. Cas., 1, sub nom. Imperial Fire Ins. Co. *vs* Bull.

surance company to be subrogated to the rights of the mortgagees must depend upon whether they had or had not a good defence against the mortgagor, the person in whose name the insurance was effected. If they had a good defence, the money paid to the mortgagees would be so paid by reason of the agreement and that alone, if they had not, the money would necessarily go in discharge of the mortgage as the policy was effected for the mortgagor's benefit and at his expense."

It has been held, however, that a clause such as this applies only to the acts of the mortgagor after the policy comes into operation and cannot be invoked in favour of the mortgagees where there has been fraud or misrepresentation by the mortgagor in his application for the policy. (30)
Approved in the Liverpool, London & Globe Insurance Co. *vs* Agricultural Savings & Loan Co. (31)

PROOFS OF LOSS MUST BE MADE BY THE MORTGAGOR.

A mortgagor insured his mill against fire with the defendants, the policy being payable on its face, to the extent of one-half, to the mortgagee.

Attached to the policy was a separate slip called a "mortgagee clause", by which it was provided that the insurance, as to the interest of the mortgagee only therein should not be invalidated by any act or neglect of the mortgagor; and, also, that whenever the company should pay the mortgagee any sum for loss under the policy, and should claim that, as to the mortgagor, no liability existed therefor, it should, to the extent of such payment, be subrogated to all the rights of the party to whom such payment should be made.

Proofs of loss were not made by the mortgagor or mortgagee until within sixty days of the end of the year after a fire had occurred; and within sixty days after the proofs were delivered,

(30) Omnium Securities Co. *vs* Canada Fire Insurance Co., 1 O. R., 494.

(31) 33 Can. S. C. R., 94.

an action was commenced by the mortgagor and the representatives of the mortgagee.

Held, (affirming the judgment of Boyd, C., at the trial) that the mortgagee was not bound as "the assured" under statutory condition 12, to make proofs of loss, and that here the person assured, the mortgagor, was the person to make them, under conditions 12 and 13.

Held, also, that the neglect of the assured to make the proofs of loss in proper time, so that the sixty days thereafter might expire before the termination of the year after the loss, within which an action had to be brought under condition 22, was a neglect from the consequences of which the mortgagee was relieved by the mortgagee clause, and that, as far as he was concerned, the action was not brought too soon.

Held, also, that the words "shall claim that, as to the mortgagor no liability exists" in the mortgagee clause, meant, "and as to the mortgagor no liability exists", and that, as the policy was valid at the time of the fire, and nothing was shown to have taken place since to render it invalid, there was a liability to the mortgagor ; that condition 22 barred the remedy and not the right, and that the defendants were not entitled to subrogation.

Held, also, that the mortgagor was bound to make the proofs in such time, that the sixty days would elapse before the expiration of the year limited for bringing the action and his remedy as to the other half of the policy was barred. (32)

In a case where the loss by the policy was made payable to a mortgagee, it was held that where the insurance company having a good defence as against the mortgagor voluntarily or under agreement pays the loss to the mortgagee, a second mortgagee upon the taking of the accounts in the master's office, is not entitled to obtain the benefit of the amount so paid the first incumbrancer. (33)

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(32) Anderson *vs* Saugeen Mutual Fire Ins. Co., 18 O. R., 355.

(33) Westmacott *vs* Hanley, 22 Gr., 382.

MORTGAGOR CONVEYING HIS EQUITY OF REDEMPTION TO MORTGAGEE.

A mortgagor who had made a mortgage, containing a covenant to insure the mortgaged premises against fire, effected an insurance thereon with defendants, the loss, by the policy, being payable to the plaintiff, the mortgagee, as his interest might appear under the mortgage. Subsequently, the mortgagor conveyed his equity of redemption to the mortgagee without the consent of the insurance company having been obtained therefor. The premises having been afterwards destroyed by fire: Held, that the plaintiff was not entitled to the insurance moneys, for (1) the fact of the conveyance made by the mortgagor to the plaintiff, whereby he ceased to have any interest at the time of the fire, was a good answer to the claim; and (2) such conveyance constituted a breach of the fourth statutory condition, which provides against the insured premises being assigned without the insurance company's consent. (34)

PARTNERSHIP.

Where the business of a partnership is taken over by a limited liability company formed for that purpose, there is such a change of interest as to invalidate insurances held by the firm in the absence of notification of the change to, and assent by, the insurance company, though the members of the partnership hold nearly all the stock in the limited liability company. (35)

RE-INSURANCE.

A contract of re-insurance is not a contract of indemnity for loss or damage by fire to the insured, but a contract of indemnity against the liability which the original insurer has undertaken with respect to a loss or damage by fire to the original insured. Strictly speaking it is a contract of guaranty, and not a contract of insurance.

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(34) Pinhey *vs* Mercantile Fire Ins. Co., 2 O. L. R., 296.
(35) Peuchen *vs* City Mutual Fire Ins. Co., 18 A. R., 446.

In Ontario the expression "insurance" includes re-insurance. (36) In Quebec re-insurance is provided for by the code.

"Art. 2477. The insurer may effect a re-insurance, and the insured may issue the solvency of the first insurer."

Code de Commerce, "342.—L'assureur peut faire ré-assurer par d'autres les effets qu'il a assurés. L'assuré peut faire assurer le coût de l'assurance. La prime de réassurance peut être moindre ou plus forte que celle de l'assurance."

The conditions ordinarily attached to a contract of fire insurance are not applicable to the contract of re-insurance.

A judgment of the Supreme Court of Canada was reversed by the Privy Council, and it was held that a contract of re-insurance evidenced by a policy of insurance containing the usual conditions of a fire insurance policy, with a rider agreement in the common form used in cases of re-insurance, did not have the effect of carrying into the contract of re-insurance all the conditions of an ordinary contract of insurance, but that the contract of re-insurance in that case was engrafted on an ordinary printed form of policy for no other purpose beyond that of indicating the origin of the direct liability to the original insured on which the indirect liability, the subject of the re-insurance, would depend, and setting forth the conditions attached to the original insurance. (37)

In the case of a re-insurance of part of its risks with another company, this will not preclude the first company from assenting to any reasonable and proper waiver of conditions of the policies made in good faith, not shown to influence the loss or increase the burden of the re-insurers. And the statutory conditions cannot be imported into a policy of re-insurance as they are in many instances wholly inapplicable to such a contract. (38)

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(36) R. S. O., 1897, ch. 203, sec. 2, ss. 41.

(37) Victoria-Montreal Fire Ins. Co. *vs* Home Ins. Co. of New York, 35 Can. S. C. R., 208.

(38) Fire Insurance Ass. *vs* Canada Fire & Marine Ins. Co., 2 O. R., 481 and 495.

QUEBEC LAW AND JURISPRUDENCE.

The following articles of the Civil Code of Quebec deal with the Insured, Insurable Interests, Assignments of insured property and of Insurance Policies.

Art. 2482. "Policies of insurance may be transferred by indorsement and delivery, or by delivery alone, subject to the conditions contained in them.

"But marine policies and fire policies can be transferred only to persons having an insurable interest in the object of the policy."

Art. 2483. "In the absence of any consent or privity on the part of the insurer, the simple transfer of the thing insured does not transfer the policy.

"The insurance is thereby terminated subject to the provisions contained in article 2576."

Art. 2576. "The insurance is rendered void by the transfer of interest in the object of it from the insured to a third person, unless such transfer is with the consent or privity of the insurer.

"The foregoing rule does not apply in the case of rights acquired by succession, or in that specified in the next following article.

"The insured has in all cases a right to assign the policy with the thing insured, subject to the conditions therein contained."

The Court of Queens Bench, Quebec, (39) held that the transfer of a policy of fire insurance to a mortgage creditor of the insured, as security for the debt of the latter, has no retroactive effect, and does not protect the transferee against defects and nullities in the policy existing prior to its transfer to and acceptance by him. So, where the insured had no valid title to the property insured the transferee cannot recover. 2. The acceptance by the insurance company of a transfer of fire insurance, validates the transfer as a transfer, but does not create a new contract of insurance with the transferee.

(39) Stanstead *vs* Gooley, Q. R., 9 Q. B., 324.

In the Supreme Court of Canada, (40) it was distinctly held that the mortgagee as assignee of a policy of insurance could not succeed where the mortgagor could not recover owing to the fraudulent misrepresentation in the application upon which the policy issued.

In an early case it was held that when a fire policy taken out by the owner of real property, declares that the loss, if any, is payable to certain persons named "as mortgagees to the extent of their claim", such persons become thereby the parties assured to the extent of their interest as mortgagees and their right and interests cannot be destroyed or impaired by any act of the owner of the property. (41)

And in National Assurance Company of Ireland *vs* Harris, (42) it was held (Cross & Doherty, JJ., diss.) following Black *vs* National Insurance Co., that where a policy of insurance against fire taken out by the owner of real property, declares that the loss, if any, is payable to a person named therein (without specifying the nature of his interest), such person becomes thereby the party insured, to the extent of his interest, and his right cannot be destroyed or impaired by any act of the owner of the property (e. g. an assignment of the property insured without notice to the company); and he may make the preliminary proofs of loss in his own behalf notwithstanding an express provision in the policy to the contrary.

But these decisions were over-ruled in Migner *vs* St. Lawrence Fire Insurance Co. (43)

In this case the policy of insurance was taken out by one Lachance and was made on its face payable to the plaintiff Migner "jusqu'à concurrence de ses intérêts". A subsequent insurance without the knowledge or consent of the company, or of Migner, was effected by Lachance, and the sole question was

(40) North British & Mercantile *vs* Tourville, 25 Can. S. C. R., 177.

(41) Black *vs* National Ins. Co., 24 L. C. J., 3 L. N., 29.

(42) 1889, M. L. R., 5 Q. B., 345, 17 R. L., 230.

(43) Q. R., 10 K. B., 122.

whether this voided the policy. The insured relied upon the two previous decisions.

The Court of King's Bench, however, affirming the judgment of the Court of Review, reversed the earlier jurisprudence, and as to the clause making the loss payable to Migner, the court said:—"Nous trouvons qu'elle constitue une simple indication de paiement. L'indication par le créancier d'une autre personne qui doit recevoir à sa place ce qui lui est dû ou ce qui pourra lui être dû, ne crée en faveur de l'indiqué aucune nouvelle obligation du débiteur."

"L'indemnité ainsi stipulée payable à Migner est l'indemnité que la compagnie a consentie en faveur de Lachance en considération des conventions et conditions acceptées par ce dernier et pour lui-même, et pour ses représentants et ayant-cause. La violation par Lachance de l'une des conditions du contrat devra anéantir ce contrat quant à lui aussi bien qu'à l'égard de tous ceux qui pourraient en attendre un bénéfice." The court in conclusion, pointing out that: "La jurisprudence en Angleterre et aux Etats-Unis, après plusieurs décisions contradictoires, paraît maintenant solidement établie dans le sens de notre présente décision."

A policy was granted to one Thompson, on his building and contents. The insured represented himself as the owner although he had previously sold the building to the respondent Sheridan, subject to a right of redemption, which right, Thompson, at the time of the application, had availed himself of by paying back to Sheridan a part of the money advanced. Subsequent to the application, the respective interests of Thompson and Sheridan in the property were fully explained to the appellants' general agent at Montreal. Thereupon a transfer of the policy was made to Sheridan by Thompson, and accepted by the company. The Court held that at the time of the application Thompson had an insurable interest, and as the appellants had accepted the transfer to Sheridan, the latter was entitled to recover, as to the building, but that Sheridan having no insurable

interest in the chattel property, the transfer made to him by Thompson was not sufficient to vest in him Thompson's right under the policy, and he could not recover in view of Art. 2482. (44)

In a case where the assignee of the policy was also the assignee of the property covered by the insurance, it was held that an insurance, by simple receipt for the premium, is legal and binding without the issue of a policy, and the interest in the insurance money may be legally assigned by any simple form of transfer endorsed on the receipt, and such transfer does not require the consent or acceptance of the insurance company to make it binding. (45)

It was held by the Court of Review, in Quebec, (46) that a policy of insurance cannot be transferred without the consent of the insurer, and notice of transfer is not of itself sufficient.

The acceptance by the insurance company of a transfer of fire insurance, validates the transfer as a transfer, but does not create a new contract of insurance with the transferee. (47)

Action for $800, amount of a fire policy. Plea, that the property insured was, after the issue of the policy, sold for taxes under the Municipal Code, and the ownership having become vested in the purchaser, the insured had lost all insurable interest therein. Special answer, that the municipal sale never finally divested the insured of the ownership; that before the fire, he had, under the provisions of the Municipal Code, redeemed his property, and had never ceased to have an insurable interest in it.

Held, that the sale of the property for municipal taxes under the Municipal Code, followed as it was by the redemption of the

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(44) Ottawa Agricultural Ins. Co. *vs* Sheridan, 5 Can. S. C. R., 157.

(45) Per Torrance, J., O'Connor *vs* Imperial Ins. C., 14 L. C. J., 219.

(46) Corse *vs* British American Co., 1 R. C., 243.

(47) Stanstead & Sherbrooke Mutual Fire Ins. Co. *vs* Gooley, Q. R., 9 Q. B., 324.

property in accordance with the said Code, was not such an alienation as would void the policy, either under the conditions endorsed upon it, or under the provisions of article 2576. (48)

McD. avait cédé à M. tous ses droits dans une société commerciale qui avait existé entre eux, à la condition que M. lui paierait $3,000, qu'il acquitterait toutes les dettes de la société et même les dettes personnelles de McD. et que, jusqu'au paiement des $3,000, il tiendrait les marchandises assurées et remettrait les polices à McD. Les marchandises étaient lors de la cession, assurées au nom de McD. seul, à deux assurances mutuelles, par trois polices qui devaient expirer quelques mois plus tard, et que McD. avait renouvelées à leur expiration. McD. et M. avaient subséquemment réglé le compte et s'étaient réciproquement donné quittance.

Jugé: Que la cession des marchandises n'avait pas transporté les polices d'assurance, qui ne couvraient plus, après leur cession, les marchandises dans lesquelles McD. n'avait plus d'intérêt assurable, et que M. ne devait les contributions, pour pertes antérieures à l'expiration des polices, que comme dettes sociales et dettes personnelles de McD.; mais que celles subséquentes au renouvellement des polices n'étaient dues que par McD. sans recours contre M. Et que McD. n'avait de recours contre M. que pour les contributions, pour pertes antérieures à l'expiration des polices, qui ne lui avaient pas été déclarées avant le règlement de compte. (49)

Before the Code, the question arose as to the right of the vendor who had sold the property insured with the assent of the company, and a loss having occurred and the money paid to the vendor, whether the vendee, who had paid his purchase money, could obtain the benefit of the insurance money.

In giving judgment, the Superior Court said:—"The question raised in this case was whether the payment of $500 (amount due under the policy) to the vendor will discharge the purchaser,

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(48) Paquet *vs* The Citizens Insurance Co., 4 Q. L. R., 230.

(49) McDonald *vs* Messier, 10 Q. L. R., 329.

or to whose benefit did the payment enure? The pretentions of the defendant were, first, that the interest of the vendor vested in the purchaser by special convention, and 2ly, that if such convention were not proved, it passed to the purchaser by mere operation of law. On both points the Court was with the defendant and considered the convention proved. The buildings were to be insured and there could be but one insurance under the circumstances. The object of the vendor was to obtain security for the balance due him..... It seemed to be carrying the principle a great way to say that the rights of the insured passed to the new purchaser by the effect of the sale, nevertheless, notwithstanding the anomaly, that seemed to be the rule; as to marine insurance, it certainly was so, and the rule was extended to insurances on real property. Quenault, Assurance, nos 214 to 226; Boulay Paty, Cours de droit commercial, p. 309; Aluzet, Assurance, nos 139 à 144; Emérigon, Traité des assurances, ch. xvi, sect. 3. As to the equity, there could be no doubt where it lay in the present case. Tavernier could not sell the property, and recover the value of it, first from the insurance and next from the purchaser, after notification to the Insurance Company of the sale to the defendant.

"Judgment: 'Considering that the defendant hath established by evidence the material allegations of his exception, and that, by reason of the matters therein contained and set forth, and by law, the plaintiff ought to be barred from having the conclusions by him in his action in this behalf taken; maintaining the said exception, doth dismiss the said action'." (50)

Where the loss under a fire insurance of goods is made payable to a party other than the person who effects the insurance, and such third party becomes owner of the goods by a transfer to him of the warehouse receipt of such goods, such third party becomes thereby the party assured, and can, therefore, legally make all necessary preliminary proofs of loss. Q. B. 1879. (51)

(50) Leclaire *vs* Crapser, 2 R. J. R. Q., 342.

(51) Stanton *vs* The Home Ins. Co., 24 L. C. J., 38; 21 J., 211; 1 L. N., 208; 2 L. N., 238; 17 R. L., 14, 230.

CREDITOR RECEIVING INSURANCE MONIES.

Le créancier qui a fait assurer la propriété de son débiteur, et qui a reçu le montant de cette assurance, ne peut recouvrer de son débiteur que la balance de sa créance, après déduction du montant reçu, moins les primes payées et l'intérêt sur ces primes. C. B. R. 1882. (52)

PROCEDURE.—JOINDER OF ACTIONS.

Une compagnie de chemin de fer est responsable des dommages causés par une de ses locomotives, qui, en traînant un de ses convois, met le feu à des bâtisses près de son chemin et une même action peut être intentée pour ces dommages par le propriétaire de ces bâtisses et par la compagnie d'assurance, qui lui a été subrogée pour partie des dommages qu'elle a payée. K. B. 1889. (53)

MORTGAGEE NOT COMPELLED TO SUE ON THE POLICY.

Where buildings on property hypothecated for the security of a loan are insured by the mortgagee as additional security for the sum lent, and a loss by fire occurs, the mortgagee is not obliged to institute proceedings against the insurance company for the recovery of the amount insured, more especially when, the only reason given by the company for not paying the loss is one resulting from the acts of the mortgagor. The latter may ask to be subrogated in the rights of the mortgagee, but only on tender to him of the amount of the mortgage debt. (54)

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(52) Archambault *vs* Lamère, 2 D. C. A., 97; 26 J., 236; 5 L. N., 294.

(53) North Shore Railway *vs* McWillie, 17 R. L., 367; M. L. R. 5 Q. B., 122; 34 L. C. J., 55; 17 Can. S. C. R., 511; 13 L. N., 217; 12 L. N., 394; 21 R. L., 192.—The first proposition is no longer law, vide Canadian Pacific Ry. *vs* Roy, 1902, A. C., 220, *vide* R. S. C. (1906), c. 37, s. 298.

(54) Montreal Loan & Mortgage Co. *vs* Denis, Q. R. 14, S. C., 106.

EFFECT OF RE-BUILDING UPON MORTGAGEES' RIGHTS UNDER THE POLICY.

The insurance by a mortgage creditor of the house or building subject to his mortgage is not an insurance of the building *per se*, but only of the creditor's security for the payment of his debt, and to support an action on the policy there must be a loss existing at the time of action brought, and if before action brought, the premises be re-built, whereby the creditor's security is restored, he cannot recover as for a loss. (55)

In the case of an assignment, with the consent of the mortgagor, of a mortgage, which contained a covenant by the assignor to transfer to the assignee as collateral security a certain policy of insurance then held by the assignor on the buildings existing on the property mortgaged, it was held that the failure by the assignee to secure such transfer and the consequent reception by the assignor of the insurance money under the policy would not entitle the mortgagor to claim from the assignee the discharge of the mortgage. (56)

TRANSFER OF CLAIM AFTER LOSS.

Art. 1570 of the Civil Code provides that "the sale of debts... is perfected between the seller and the buyer by the completion of the title if authentic, or the delivery of it if under private signature."

Art. 1571 provides that "the buyer has no possession available against third persons until signification of the act of sale has been made and a copy of it delivered to the debtor."

It was held in the Court of King's Bench that "signification" of an act of sale under the Civil Code must be made by a notary, and that as this had not been done in the present case, where the plaintiffs were the transferees of the assured under a policy of insurance, the action must fail.

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(55) Mathewson *vs* Western Ass. Co., 4 L. C. J., 57, 10 L. C. R., 8.
(56) Robert *vs* Macdonald, 19 L. C. J., 90.

On appeal to the Privy Council this judgment was reversed and that of the minority of the Court, expressed by Wurtele, J., affirmed, namely, that the intervention of a notary was not required by the Civil Code.

It was further held that the assignee of the debt could bring the action to enforce his claim without any signification to the debtor of the act of sale; that the institution of the action alone was a sufficient signification. (57)

It was held that a transfer of a contract of insurance, by a private writing made in duplicate, signed by the transferer and transferee in the presence of two witnesses, is good and valid;

That the admission of the debtor that he received a duplicate of such transfer is a sufficient signification (1571 C. C.);

That an estimate by the insured in round figures of the value of the stock, at the time of the application, should not be considered a ground of nullity, unless it contains such an exaggeration as creates a suspicion of fraudulent intention. (58)

SUBROGATION. — QUEBEC.

Art. 2584 reads as follows: "The insurer on paying the loss is entitled to a transfer of the rights of the insured against the persons by whose fault the fire or loss was caused."

Les assureurs contre le feu ont droit, en payant la perte couverte par leur police, d'être subrogés aux droits et actions de l'assuré, contre ceux qui ont causé le feu et la perte.

Un marguillier en charge qui a pouvoir de recevoir des assureurs le montant de l'assurance effectuée sur la propriété de la Fabrique et d'en donner quittance, peut aussi subroger les assureurs aux droits et actions de la Fabrique contre ceux qui ont causé le feu et la perte, quoiqu'il ne puisse transporter, au moyen d'une vente, tels droits et actions sans une autorisation spéciale.

Les assureurs, subrogés, au moyen du paiement de la perte,

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(57) Bank of Toronto *vs* St. Lawrence Fire Ins. Co., Q. R., 19 S C., 436.

(58) Western Assurance Co. *vs* Garland, Q. R. 12 K. B. 530.

aux droits et actions de l'assuré pour une partie de la perte seulement, ont pour telle partie une action contre ceux qui ont causé le feu et la perte en question. (59)

OTHER CASES.

Aucune cession des droits de l'assuré n'ayant été faite à l'assureur, lors du paiement de l'assurance, ce dernier ne peut pas invoquer, contre l'auteur du sinistre, le bénéfice de l'article 2584 C. C.

L'assureur qui a payé le montant de l'assurance à l'assuré a, pour se faire rembourser, contre l'auteur du sinistre, le recours en dommages de l'article 1053. (60)

A loss under a fire policy effected by an official assignee under the Insolvent Act of 1875, to whom an assignment had been made under the Act, is recoverable by the assignee subsequently elected by the creditors, notwithstanding that in the policy the assured is described simply as "official assignee", the loss being made payable to the estate. (61)

Although A. is merely the agent of B. in obtaining from C. an advance of money on certain goods, yet if he render himself liable to C. for any loss which might arise after the sale of the goods, he has an insurable interest in the goods, and can therefore legally insure them in his own name to the full extent of the loan. (62)

In the case of an insurance of a number of barrels of oil, purchased by the insured, but not actually identified and separated from other barrels of oil contained in the building in which the oil was stored, the insured has nevertheless an insurable interest as proprietor in the property sold. And a verdict of a jury in

(59) Ramsay *vs* Mintreal Street Ry. Co., 11 L. N., 2; 32 L. C. J., 52.

(60) Cedar Shingle Co. *vs* Rimouski Ass. Co., Q. R. 2 Q. B., 379; 16 L. N., 306.

(61) Elliott *vs* National Ins. Co., 23 L. C. J., 12, 1 L. N., 450, reversing S. C., 21 L. C. J., 242.

(62) O'Connor *vs* Imperial Ins. Co., 14 L. C. J., 219.

favour of the insurance company, based on a charge of the judge that the property in the oil did not, under the circumstances, pass to the insured, will be set aside and a new trial granted. (63)

Goods held under a duly endorsed warehouse receipt, as collateral security for advances, may be properly and legally insured as being the property of the holder of such receipt, being the party who made the advances. (64)

The usufructuary has a sufficient interest to insure a house of which he has the usufruct, but in case of loss he can only claim the value of his interest in the property. (65)

P. transferred to appellant two insurance policies issued by respondents. Subsequently, the property insured was destroyed by fire, but this was only after P. had ceased to have any interest in such policy. On a claim by appellant to recover the amount of said policies, Held, 1st. that the assignee of a policy issued by a Mutual Ins. Co. can only exercise such claims as the transferer could himself have done; 2nd. that, in this case, P. having ceased to have any title to the property insured, when the fire occurred, he could not recover the amount insured under the policies aforesaid and that the appellant was therefore debarred from such claim. (66)

The sale of property insured does not convey to the purchaser the policy of insurance, without a transfer of the policy and by mere operation of law. (67)

An assignment of the policy can convey no greater rights under the same than the assured himself had. (68)

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(63) Mathewson *vs* Royal Ins. Co., 16 L. C. J., 45.

(64) Wilson *vs* Citizens Ins. Co., Q. B., 19 L. C. J., 175.

(65) St. Amand *vs* Cie d'Assurance de Québec, S. C., 1883, 9 Q. L. R., 162, 14 R. L., 27.

(66) Willey *vs* Mutual Fire Ins. Co., 2 Dorion, Q. B. R., 29.

(67) Forgie *vs* Royal Insurance Co., 16 L. C. J., 34.

(68) New York Life Ins. Co. *vs* Parent, 3 Q. L. R., 163.

CHAPTER V

WAIVER AND ESTOPPEL.

Waiver and estoppel. — Expressions used synonymously. — Origin of doctrine: Waiver, express and implied; Void and voidable; Implied waiver. — Waiver before loss of breach before loss; Waiver after loss of breach before loss; Waiver after loss of breach after loss; Legislation relieving insured from breach of condition.

WAIVER AND ESTOPPEL.

Much of the difficulty which is found in attempting to harmonize the decisions of our courts in insurance cases, arises from a failure of some judges to clearly appreciate the distinction between waiver and estoppel by misrepresentation.

This fact is also pointed out in the most recent American work on the law of Insurance, (1) where the writer states that the difference between waiver and estoppel as applied to the law of insurance is not clearly defined in the decisions of the United States, and cites with approval, the distinction pointed out in Metcalf *vs* Phenix Ins. Co., (2) as follows: — "A waiver arises by the *intentional* relinquishment of a right by a person or party, or *by his neglect to insist upon his right at the proper time*, and does not imply any conduct or dealing with another

(1) Cooley, Briefs on the Law of Insurance, p. 2460.
(2) 43 Atl., 541.

by which that other is induced to act or forbear to act to his disadvantage; while an estoppel necessarily presupposes some such conduct or dealing with another."

INTENT.

Intent is an essential element of waiver, and it is from "the neglect to insist upon his right at the proper time" that the intent to waive is inferred.

On the other hand a party may be estopped by his representation when he has *no intention* it should be acted upon.

ORIGIN OF DOCTRINE OF WAIVER.

Waiver of forfeiture in insurance cases has grown out of the doctrine as applied in the relationship of landlord and tenant.

In holding an act of the landlord to be a waiver of forfeiture, the court simply construes his act according to his intention.

The principle is thus expressed by Lord Mansfield: (3) "The case is extremely clear. To construe this acceptance of rent, due since the condition broken, a waiver of the forfeiture, is to construe it according to the intention of the parties. Upon the breach of the condition the landlord had a right to enter. He had full notice of the breach, but does not take advantage of it, but accepts rent subsequently accrued. That shows he meant that the lease should continue. Forfeitures are not favoured in law; and when a forfeiture is once waived, the court will not assist it."

The same principle has been applied in a great many other cases between landlord and tenant. (4)

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(3) Goodright *vs* Davids, 2 Cowp., 803.

(4) Roe *vs* Harrison, 2 T. R., 425; Doe *vs* Birch, 1. M. & W., 402; Croft *vs* Lumley, 5 E. & B., 648, 6 H. L. Cas. 672; Walrond *vs* Hawkins, L. R., 10 C. P., 342; Hunt *vs* Bishop, 8 Exch., 675; Hunt *vs* Remnant, 9 Id., 635; Green's Case, 1 Cro. Eliz. 3, cited in 1 M. & W., 406; Pellatt *vs* Boosey, 31 L. J. C. P., 281; Ward *vs* Day, 4 B. & S., 337, 5 Id., 359; Doe *vs* Curwood, 1 H. & W., 140; Doe *vs* Meux, 4 B.

WAIVER EQUIVALENT TO ELECTION.

Waiver arises where a party having the right to take one of two inconsistent positions, elects in favour of one. In such case he is bound by his election, and this irrespective altogether of whether or not any other party has relied upon his action and would be prejudiced by permitting him to withdraw from such election.

ESTOPPEL BY MISREPRESENTATION.

Although having a more ancient origin, it is not necessary to revert to cases prior to the well known decision of Pickard *vs* Sears, in 1837, (5) for a clear statement of the principle of estoppel by misrepresentation which is thus enunciated by Lord Denman, C. J.: "But the rule of law is clear, that, where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time."

In 1848, Baron Parke, in Freeman *vs* Cooke, (6) while affirming Pickard *vs* Sears, puts a gloss upon the word "wilfully" in the above rule as follows: "By the term 'wilfully', however, in that rule, we must understand, if not that the party represents that to be true which he knows to be untrue, at least, that he *means* his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he

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& C., 606; Doe *vs* Lewis, 5 A. & E., 277; Goatley *vs* Paine, 2 Camp., 520; Few *vs* Perkins, L. R., 2 Ex., 92; Doe *vs* Eykins, 1 C. & P., 154; Gregory *vs* Wilson, 9 Hare, 683; Evans *vs* Davis, 10 Ch. D. 747; Toleman *vs* Portbury, L. R., 6 Q. B., 245, 7 Id., 344; Victoria, A-G of, *vs* Ettershank, L. R., 6 P. C., 354.

(5) 6 A. & E., 469.

(6) 2 Exch. 654.

should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth; and conduct, by negligence or omission, where there is a duty cast upon a person, by usage of trade or otherwise, to disclose the truth, may often have the same effect."

"WAIVER" AND "ESTOPPEL" USED SYNONYMOUSLY BY THE COURT.

It very frequently happens that the facts of the case are sufficient to establish either waiver or estoppel. It is for this reason that the courts so often have used the words "waiver" and "estoppel" indiscriminately. This is well illustrated by two cases in Ontario, Smith *vs* Mutual Ins. Co., (7) and McIntyre *vs* East Williams, (8) where the principle involved was the same. In the one case the plaintiff succeeded on the ground of waiver, and in the other on the ground of estoppel.

In an action on a policy of a mutual insurance company the defendants pleaded that a certain assessment was declared by the defendants on the plaintiff's premium note of which assessment the plaintiff had due notice, but did not pay the same, whereby the policy became void. A replication alleged that subsequent to the alleged avoidance and previous to the loss, defendants levied another assessment which the plaintiff was duly notified of and paid, whereby the defendants waived the alleged forfeiture. The court said:

"As to the replication, we think it is good. The plea shews matter involving the forfeiture and avoidance of the policy. The answer is in effect that subsequent to the alleged avoidance the company levied another assessment of $7.77 of which the plaintiff was notified, and duly paid the same, all before loss, and so the defendants by their acts, etc., waived the alleged forfeiture and revived the policy, and ought not to be allowed to plead the said plea.

(7) 27 U. C. C. P., 441.

(8) 18 O. R., 79.

"This seems to shew a clear revival of the policy—a payment to the plaintiff thereon; and that the defendants cannot be allowed to fall back on a previous default, to destroy the plaintiff's right."

It is clear that in this case the plaintiff might have equally well replied to the defendants' plea claiming that by notifying him of the subsequent assessment and receiving the same, he had been lulled into inaction, to use the language of the judge in the next case, and that the defendants were estopped from setting up the said plea. In fact Gwynne, J., in pronouncing the judgment of the court in Lyons *vs* Globe Mutual, (9) expressly states that this decision was based upon the fact that the company by its act had led the insured to rely upon the policy as a subsisting security against the loss which subsequently happened. He thus invoked the doctrine of estoppel.

In the second case, (10) the defendants, also a mutual insurance company, set up as a defence to the action a subsequent insurance, and claimed the benefit of a condition of the policy which required that notice of subsequent insurance should be given to the company and indorsed upon the policy. The plaintiff replied that he notified the secretary of the company of the double insurance, and was informed that there was nothing further necessary for him to do, and that he was, subsequent to such notice, assessed on his premium note for an additional amount which he paid. The court held that the payment and receipt of the premium with knowledge of the subsequent insurance operated as an estoppel upon the company, although of the opinion that the notification to the secretary not having been indorsed on the policy as provided by one of the conditions, did not fulfil the requirements of the statute, and that the plaintiff could obtain no benefit thereby.

In this case also the plaintiff, on the facts, could have set up that the meaning of the subsequent assessment and the demand

(9) 28 U. C. C. P., 62.

(10) McIntyre *vs* East Williams 18 O. R., 79.

and receipt of the same operated as a waiver of the forfeiture. He would no doubt, however, have been met by the rejoinder that the waiver of the condition of the policy required to be indorsed in writing on the policy and it was necessary that his replication should be grounded on estoppel and not on waiver.

Waiver and estoppel used synonymously by the pleader.

When the pleading uses the word "waiver", although the facts justify an answer on the ground of "estoppel", the courts, looking at the facts and not at the express language of the pleadings, have given relief. That the distinction, however, clearly exists is pointed out in the case of Cousineau *vs* City of London Fire Ins. Co. (11)

Here by the 11th paragraph of the defence, it was stated that the policy was subject to the condition that the claim should be barred unless an action thereon was commenced within one year from the time of the loss or damage, and that the action was commenced after the expiration of the year. The plaintiff replied by admitting the fact that the action was not brought within the year, but relied in answer thereto upon the fact that, at the request of the defendants, he had furnished additional proofs of loss after the year had expired, and contended that the defendants had thereby waived the compliance with the condition as to the action being brought within a year from the loss or damage. As to this, Street, J., says: "In the absence of any agreement not to insist upon the condition, the question of waiver must come down to an enquiry as to whether what has occurred operates against the defendants as an estoppel; for the defendants must be held entitled to insist upon the protection of the clause in the policy, it being clearly not an unreasonable one, unless they have either agreed not to set it up, or have so acted as to entitle the plaintiff to say that they are estopped from taking advantage of it."

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(11) 15 O. R., p. 329.

The Divisional Court consisted of two judges, Armour, C. J. and Street, J., the latter differing from the Chief Justice, and holding on the facts of the case that the plaintiff should not succeed, saying: "I think that the doctrine of estoppel has been carried extremely far in many of the cases, and that to apply it here would be to carry it a step farther than it has yet gone."

Armour, C. J., in affirming the judgment below says: "I am of opinion that the conduct of the defendants in requesting the plaintiff to procure and furnish additional particulars concerning the claim up to the time mentioned in the case, and thereby putting him to loss of time, trouble, and expense in procuring and furnishing the same was a waiver of, and precluded the defendants from setting up the 22nd statutory condition."

It will be perceived that the Chief Justice uses the word "waiver" in the sense of estoppel, while Street, J., is more precise. This case is not an authority for the proposition that asking for proofs of loss constitutes a waiver, but rather that such acts may estop the defendants from claiming the benefit of the condition which requires the action to be brought within a limited time.

WAIVER AND ESTOPPEL DISTINGUISHED.

The distinction between waiver and estoppel is well illustrated in the case of Caldwell *vs* The Stadacona Fire and Life Ins. Co. (12) The facts of the case are thus set out in the judgment of Strong, J.—

This was an action in the Supreme Court of Nova Scotia brought by Samuel Caldwell and his wife against the Stadacona Assurance Company. The policy of insurance sued upon as originally issued was for one year, namely, from the 10th August, 1875 to 10th August, 1876, but, as is proved by the renewal receipt in evidence, it was subsequently renewed and continued until 10th August, 1877. It was under the seal of the respondent company, and purported to be effected in favour of the ap-

(12) 11 Can. S. C. R., 212.

pellant, Samuel Caldwell. It contained, however, a provision in the following words: "Loss, if any, under this policy, payable to George R. Anderson, Esq., Halifax, N. S." The policy was subject to conditions, of which the 9th required particulars and proofs of loss to be delivered "within five days after such loss or damage has occurred."

The 11th condition provided as follows: "Any action to be brought on the policy is required to be commenced within the term of six months next after any loss or damage shall occur."

And the 12th was in these words: "None of the foregoing conditions or stipulations, either in whole or in part, shall be deemed to have been waived by or on the part of the company, unless the waiver be clearly expressed in writing by endorsement on this policy, signed by the manager of this company for Canada."

The declaration, in addition to a count framed in the usual manner in covenant for the recovery of the amount of the loss, contained a count in trover for the policy. Amongst the defences pleaded were, substantially, that the amount of loss was payable to Anderson; that there had been a breach of condition requiring proofs of loss to be delivered within five days.

To the plea of non-delivery of proof according to condition the plaintiff replied a waiver of the condition in that respect, to which the defendants rejoined that the waiver was not in writing, as required by the conditions. Upon the other defences issue was taken.

The house insured was destroyed by fire on the 4th July, 1877. Notice of a total loss was promptly given to the general agent of the company at Halifax, and application was made to him to deliver up the policy which was in his possession, and for instructions as to the proof of loss required. At his suggestion the putting in of proofs was deferred, to allow him time to communicate with his head office regarding the policy, and ultimately, on the 25th of July, the proofs of loss were furnished by the appellant's solicitor to the agent, who received them without objection, and retained them. Accompanying the proof of loss

was a letter from the appellants' attorney, Mr. Richey, to Mr. Greer, the respondent's general agent, in which he wrote as follows: "Herewith I hand you proof of loss in the case of Samuel Caldwell, prepared with as close conformity to the requirements of your office as we can attain without the policy, which is now, I understand, in your custody, and I have thus far been unable to obtain it. It is, however, not convenient for my client to longer delay making his claim in this formal manner, and I shall be obliged by your acquainting me, on receipt of this, whether any objection exists to either the claim or the form in which it is prescribed."

No objection was ever made, in any particular, to the proofs of loss furnished, and the only contention ever raised by respondents prior to their pleadings to the action was, that they were not liable, because the policy had been cancelled.

The refusal of the respondents to give up the policy for the purpose of preparing the proofs, upon an application being made to their agents for that purpose, was proved by Mr. Richey, the plaintiff's attorney, and also by Mr. Anderson, and the fact was admitted by the respondents' agent, Mr. Greer, acting as he said under instructions from the general manager.

A non-suit having been moved for on several grounds included in the numerous list of objections, it was refused by the learned judge, who thereupon found a verdict for the plaintiff for $4,000 and interest. A rule *nisi,* which was granted to set aside this verdict, on the general ground that it was against law and evidence, and on the specific points which were urged at the trial on the motion for non-suit, was, after argument before the court in banc, made absolute.

The judgment of the court below, in granting this new trial, appears to have been founded exclusively upon the single ground that, although a waiver of the requirements of the 9th condition as to delivering proofs or particulars of loss within five days, had been sufficiently made out, if parol evidence had been admissible, yet, that the 12th condition, requiring waiver to be expressed

in writing, by endorsement on the policy, applied to and excluded all proof to that effect other than such as was required by the terms of the condition referred to.

The Supreme Court held that the court below had erred in disposing of the case solely on the question of waiver, saying, per Ritchie, C.J. (p. 225): "But defendants contend that none of the conditions can be waived by reason of the waiver not being in writing, and they invoke the twelfth condition, which says:—

"'No. 12. None of the foregoing conditions or stipulations, either in whole or in part, shall be deemed to have been waived by or on the part of the company, unless the waiver be clearly expressed in writing, by endorsement upon this policy, signed by the manager of this company for Canada.'"

"And the Supreme Court of Nova Scotia rest their judgment on this, that though they think there was evidence of a waiver, a conclusion fully justified by the conduct of the company through their agents, yet they thought a parol dispensation would not answer to act as a waiver against a written condition of the policy.

"But if condition No. 12 applied to the conditions, as to proofs of loss, I think the court erred in treating this as a waiver, but should have held the defendants estopped by matter in *pais from* setting up the non-compliance with the condition."

Strong, J., said (p. 241): "Upon these facts it is plain that the illegal retention of the policy by the respondents, and the conduct of their agent in reference to it, were the true and only reasons why the proofs were not furnished in due time. Had Mr. Richey known the terms of the condition, as he would have done if the policy of which his client was entitled to the possession had not been wrongfully withheld, it must be presumed against the respondents that the proofs would have been furnished within the prescribed time. Again, had Greer, instead of misleading Mr. Richey, by asking that the proofs should be delayed, stated to him that the condition required their presentation within five days, it must be presumed that a similar result would

have followed. This conduct, therefore, constitutes an estoppel, and disentitles the respondents to the benefit of the 9th condition, which must, for the purposes of this action, be considered as struck out of the policy. This is, of course, an entirely distinct ground from that of waiver under the 12th condition. Had the appellant had the policy in his possession, or had the facts regarding the limitation of time been truly stated to his attorney by Greer, the mere request of the latter that the proofs should be delayed would have been nothing more than a dispensation with the terms of the condition, by agreement, which would have required endorsement on the policy in the terms of the condition excluding proof of waiver unless so evidenced. As it is however, it is apparent that the respondents, by their unjustifiable conduct, caused the non-compliance with the terms of the policy, which they now insist on as constituting a defence to the action. To allow them thus to avail themselves of their own wrong, would be to assist them to commit a fraud, and whenever such is the case an estoppel arises."

This case clearly shows the necessity for bearing in mind the distinction between waiver and estoppel. The facts upon which the replication of waiver was based were amply sufficient to support an estoppel by misrepresentation, but could not be used in the face of condition 12 of the policy, as equivalent to an accord and satisfaction, because that condition expressly provided that the waiver to be binding must be endorsed upon the policy and signed by the manager of the company.

It was the use of the word "waiver" in the sense of a deliberate intention to dispense with the strict performance of some term or condition of the fire insurance contract, that was under consideration in many of the earlier decisions of the courts of Ontario, where it was held that the agent of the company had no power to waive the conditions of a policy, under seal. In one of the earliest reported cases, (13) one of the conditions of the pol-

(13) Lampkin *vs* The Western Ass. Co. (in 1856), 13 U. C. R., 237, 361.

icy of insurance in question was that no action should be brought under it against the company unless within twelve months after the right accrued. The plaintiff alleged a waiver of this condition and relied upon an alleged conversation between his agent and the President of the company. It was held that the condition could not be so waived, and the evidence was properly rejected. The action was a purely common law one, and contained no replication on equitable grounds.

In Scott *vs* Niagara District Mutual Ins. Co., (14) to an action on a policy of insurance, defendants pleaded the non-performance of the condition requiring the delivery of a particular account of the plaintiff's loss verified by his oath or affirmation and by his books of account within thirty days after the loss. The plaintiff replied *de injuriâ,* and at the trial relied upon a parol waiver of this condition by the defendants' managing director and secretary. The evidence showed that the plaintiff had delivered an affidavit containing a statement of his loss in general terms to the managing director and the secretary of the defendants at their head office, and that both these officers stated that no other proof was necessary. In the judgment of the court pronounced by Draper, C. J., following the then recent decision of the Thames Iron Works Co. *vs* Royal Mail Steam Packet Co., 13 C. B. N. S., 358, it is said: "We see no foundation for admitting evidence which in effect contradicts the declaration by setting up a substituted contract. Here the original contract was under seal. A subsequent parol contract could not be pleaded in bar of it."

This technical rule of the common law, that a contract contained in a deed under seal could not be rescinded or varied by an agreement not under seal, was frequently applied in actions brought upon policies of insurance, and relief was sometimes refused by the common law courts, even where the record contained a replication on equitable grounds setting up the waiver. (15)

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(14) (1865), 25 U. C. R., 119.

(15) Merritt *vs* Niagara Mutual Ins. Co., 18 U. C. R., at p. 529.

This rule of law was always disregarded in equity, and an injunction could be obtained restraining an action brought upon a deed in breach of the terms of a subsequent agreement or waiver. Since the fusion of law and equity in England, by the Supreme Court of Judicature Act, 1873, a valid parol agreement may be pleaded in answer to any proceeding upon the original deed; and the rule of the common law that a contract under seal cannot be varied or discharged by a parol agreement is thus practically superseded. (16)

WAIVER MUST BE PLEADED. (17)

In a case in which it was contended that the defendants had waived a provision in a contract of insurance which provided that the policy should be void unless prosecuted within one year from the date of the loss, the court said: "The appellant cannot be admitted to insist on waiver in the state of the record before us. If it had been intended to rely on this reply, it should have been set up by a special answer to the exception pleading the prescription, but this was not done. It is, therefore, out of the question now, in this second stage of the appeal, to consider this answer to the defence, even if it were sustained by the clearest and strongest evidence." (18)

WAIVER, EXPRESS AND IMPLIED.

Waiver, by some writers, is subdivided into two classes, *express* and *implied.*

Express waiver arises when the person entitled to anything expressly and in terms gives it up, in which case it nearly resembles a *release.* (18a) Little difficulty arises in such cases.

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(16) Steeds *vs* Steeds, 22 Q. B. D., 537.

(17) Allen *vs* Merchants Marine Ins. Co., 15 Can. S. C. R., 488.

(18) This decision was followed in the Knights of Maccabees *vs* Hilliker, 29 Can. S. C. R., 397.

(18a) Stackhouse *vs* Barnston, 10 Ves. 453.

Where there is a condition that the waiver to be valid must be endorsed upon the policy, and signed by the company or its agent, this provision will be enforced by the courts, but if the insured has failed to obtain such endorsement owing to the representation of the company or its agent, it will be a good replication to a plea of waiver to allege this fact as a ground of estoppel against the company.

Implied waiver arises when the person entitled to anything does or acquiesces is something else which is inconsistent with that to which he is so entitled.

There is obviously no place for *implied waiver* in an action upon a policy of insurance which expressly provides that no waiver shall be valid unless endorsed on the policy.

Void equivalent to voidable.

It is with respect to waiver, differentiated from estoppel, and equivalent in its significance to election (supra, p. 127), that the courts have had to construe the word "void" as meaning "voidable" in insurance contracts.

In provinces where the statutory conditions are in force, one of which requires that waiver must be in writing to void the policy, it will be found that where the plaintiff has succeeded on the ground of waiver by the company of a breach of a condition, the ground of relief has really been estoppel, and that there has been a looseness in the use of the expression "waiver" by the Court, as pointed out above.

The most luminous discussion of this question is to be found in the well known case of Armstrong *vs* Turquand, 9 Ir. L. R. Common Law, p. 32, in the judgment of the majority of the Court, pronounced by Christian, J., and which has been frequently cited with approval, and which is so apt to the subject under discussion, and so fully reviews all the earlier decisions, that it will bear quoting at some length.

To an action brought by the administratrix of a party who had effected a policy upon his own life in the D. and G. Assur-

ance Co., and which policy contained a proviso that, in case the said assured had been guilty of fraud in procuring it, etc., the policy should be void, and all moneys paid in respect of it should be forfeited to the company, the latter pleaded that the party assured had, at the time of effecting the policy, in conjunction with the agent of the company, fraudulently concealed the fact of his having met with an accident, from the effects of which he was then suffering paralysis, and had withheld all knowledge from the company of the uninsurability of his life. The plaintiff replied that the company, after they had knowledge of the facts pleaded, received a second premium from the insured, and thereby elected to affirm the policy.

Held, upon demurrer to the replication (Monahan, C. J., dissentiente), that the meaning of the proviso was that the policy should be void in the particular event, in case the company should elect to treat it so; and that inasmuch as they had elected to treat it as subsisting, by the receipt of the subsequent premium, they were liable for the amount.

The learned judge says: "It will be seen that the nature of the question is that which is raised by the demurrer. The defence alleges, that the first of the events upon the happening of any one of which it was declared that the policy should be void, did in fact occur, viz., the assured 'was guilty of fraud in procuring the policy', and that therefore the policy was utterly void. To this the replication answers (by way of confession or avoidance) that the company discovered the fraud, and that, after they had so discovered it, they not only did not elect to disaffirm or avoid the policy, but, on the contrary, affirmed the same, and elected to hold it valid; and that accordingly, during the lifetime of the assured, and after they had become acquainted with the fraud, they received a premium which became due, subsequently to such knowledge. The demurrer admits these averments to be true in fact, but insists that in point of law they do not displace the defence...

"The case resolved itself into two propositions, upon which the

Counsel for the plaintiff finally rested their case, and which were these:—First, upon the construction of the policy, they insisted that the words 'shall be void' in the condition, do not mean shall be *ipso facto* irrevocably and irrecoverably void, but only void if the company shall, after breach, elect so to treat it. And if this be the true construction, then (they say) that inasmuch as the replication avers that the company, after knowledge of the event, not only did not elect to treat the policy as void, but on the contrary did, for valuable consideration, elect to treat it as of continuing validity, they cannot now revert to an election to treat it as void, and, therefore, the replication is a full answer to the plea. But secondly they insist, that if the question of construction be against them, and that if once the facts averred in the plea are brought to the knowledge of the Court, though the Court must hold that they annul the policy beyond the reach of confirmation, yet the conduct of the company, as alleged in the replication, has the effect of an estoppel upon them against averring those facts, and that consequently the case must be decided as if they had not been pleaded, or did not exist.

"Upon the *first* of these contentions, I am of opinion that the plaintiff's argument is correct; and, if it can be sustained it undoubtedly furnishes an easy means of escaping from the fraudulent injustice which the defendant's construction of the clause in question would make it and similar clauses in other policies the means of effecting.

"The principal argument which was pressed upon us in answer to this view of the plaintiff's case was, that his construction violates what was called the natural and grammatical signification of the word 'void', making it bear the sense of 'voidable', and we were strongly pressed with the rule of construction which it was said is more closely adhered to in modern times, and for which we were referred to the so often cited *dicta* in Grey *vs* Pearson (6 H. L. Cas. 106), especially that of Lord Wensleydale, viz:—'The grammatical and ordinary sense of the

words is to be adhered to, unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument'; none of which consequences, it was said, would follow from using the word 'void' in this policy in what was said to be its grammatical and ordinary sense.

"Now with respect to the rule of construction, I find it laid down by Lord Cranworth also, in the same case of Grey *vs* Pearson, in terms which appear to me to be materially different from, and more accurate than those used by Lord Wensleydale. In p. 78, he says:—'The rule of construction which, in modern times particularly, the Courts have always been anxiously inclined to follow has been to adhere as rigidly as possible to the express words that are found, whether in wills or in deeds, and to give to those words their natural ordinary meaning, unless, by so doing, it appears from the context that you are using them in a different sense from that in which the testator or maker of the deed intended to use them; or, unless by so using them, you would be doing something which would manifestly lead to an inconsistency, which could not have been the intention of the party making the instrument'. That is to say, according to Lord Wensleydale, grammar must prevail, unless it will lead to some absurdity, repugnance or inconsistency. According to Lord Cranworth, grammar must give way, not only when it leads to such consequences, but also when it appears from the context that the grammatical or ordinary sense of the words is not the sense 'in which the testator or maker of the deed intended to use them.'

"In applying this rule of construction to the present case, it was broadly assumed that the plaintiff's construction of the policy does violate the natural and ordinary signification of the word 'void'. Now I do not think that that is so clear. The real controversy is not, whether the grammatical sense of 'void' shall be altered, but whether the intention of the parties does not require that its *operation* shall be *postponed*. Does it mean void *eo instanti*, or void if and when the company shall so elect?

If the latter be the true meaning, the effect is merely this, that the word is inoperative until the election is made. When that occurs, it operates for the first time, and then in its natural sense of entire nullification. The truth is, that the question is one of intention and of substance, and not merely of grammar and of words, and is really this—which of two modes of operation, of either of which the words of this deed are susceptible, will best effectuate the intention of the maker of it, viz., that which annuls the contract *in invitum,* and beyond the control even of the person for whose benefit the clause was intended, or that which will make it void only in the event of that person thinking it for his benefit, so to insist? But be that as it may, I turn now to the more important consideration, whether the question cannot be elucidated by authority more satisfactory than the *dicta* of Judges, laying down abstract canons of construction. We are dealing here with language which is of very frequent occurrence in legal instruments, and which has been the subject of discussion and decision in many reported cases. If it be of that rigid and inflexible character that in this case it bars the path in which a Court of Law must tread on its way to justice, we may at least expect to be referred to the cases in which Courts of Law have already found themselves compelled to succumb to such an obstacle.

"The plaintiff appeals to a body of authority which touches this question more nearly. * * * * * : I allude to the long train of decisions which have been made upon leases, and by which, notwithstanding some early cases, it is now clearly established that, in the case of a lease for years, a *proviso* declaring that, upon breach of covenant, the lease shall be null and void, shall be construed to mean, no matter how strong and emphatic the language, void at the election only of the lessor; so that, although a covenant may be broken, the lease remains valid until the lessor intimates his intention to take advantage of the proviso; and if, before he does so, he by any act, such as receipt of rent subsequently accruing, recognises the continuance of the lease, he cannot afterwards rely upon such antecedent

breach. But the principle of those decisions cannot be confined to leases; and that it is not so, is shown by the case of Hyde *vs* Watts (12 M. & W., 254)."

The learned judge then proceeds to discuss in detail the decisions to which he has above referred, and proceeds, on p. 55:

"Another class of cases which was referred to by the Counsel for the plaintiff, as instancing the freedom which Courts have assumed in moulding language of this kind, so as to avoid unjust and unreasonable consequences, are those which have arisen upon the English statute of Eliz., relating to ecclesiastical leases, which will be found referred to by Tindal, C. J., in Malins *vs* Freeman (4 Bing. N. C. 395). These statutes had enacted that all leases by bishops, &c., in any other manner than as required in the Acts, 'shall be utterly void and of no effect, to all intents and purposes.' Yet it was held, notwithstanding this positive language, that the leases were not void at all as against the grantors, but only against the successors.

"It now only remains for me to notice one case more, which is, however, of great importance in the argument, and in its facts more nearly resembles the present than any other that has been cited; I allude to the case of Wing *vs* Harvey (5 DeGMcN. & G. 265). It was decided by the Lords Justices Knight Bruce and Turner; it came before them in the shape of what in the Court of Chancery in England is termed a claim, by the plaintiff as assignee of a policy executed by one Bennett on his own life, with the Norwich Union Society. On the policy was indorsed a condition that, 'if the party upon whose life the insurance is granted shall go beyond the limits of Europe without the license of the directors, *this policy shall become void,* the insurance intended to be hereby effected *shall cease,* and the money paid to the Society become forfeited to its use.' The material facts were, that Bennett, after assigning the policy, went to reside abroad, without license of the directors. The plaintiff continued to pay the premiums for a number of years, at a country office of the company, to their agent there, who was informed of Bennett's absence, and stated to the plaintiff that the policy was

notwithstanding good, provided the premiums were regularly paid. There was also some evidence that the head officer, to whom the premiums were transmitted, had notice of Bennett's absence; but the case was decided irrespectively of this. After Bennett's death, the company refused payment, on the ground that, by the terms of the proviso, the policy became void when Bennett left Europe, without leave of the directors; but they offered to repay the premiums. The claim was filed for payment of the insurance money, or, in the alternative, repayment of the premiums, with interest. The Court, without calling for a reply, decided that the effect of the receipt of the premiums with knowledge, was, that the policy continued to be valid and subsisting, and they decreed payment of the full amount.

"The similarity of this case to the one before us is too obvious to need comment; and I shall now proceed to consider the grounds upon which its value as an authority has been impugned. In the first place, it is said that it was the decision of a Court of Equity, that it proceeded upon equitable grounds, and is consequently no authority for the guidance of a Court of Law. Unless the second branch of this proposition be true, the first is manifestly of no importance. If the decision did not proceed upon equitable grounds, but upon such as are common to Courts of Law and Equity, it is as valid an authority here as would be a judgment of the Queen's Bench. Was it then decided upon grounds peculiar to Courts of Equity? If so, they will be apparent upon the report. There is a decision of two judges, of the very highest character in eminence, as perfect masters as any now living of our judicature, more especially as regards the divergences of Equity from Law; as little likely, therefore, they are as any to sustain a judgment of Equity by reasons of Law; yet it will be difficult to point out a single reason or observation in the judgment of either, which would not have been equally pertinent in an action on the policy in the name of Bennett's personal representative. A little attention to the report will make it very clear that the ground of decision was simply this, that the effect of the receipt of the premiu ns

was, that the original validity of the policy remained, which could only be by holding 'void' to mean void only at the election of the company. The argument of the Counsel for the company distinctly raised the question. It was this: — *'The policies became void by the breach of the condition* endorsed upon them, and could only have been again entered into by the Association itself, or some person having authority from them. Lockwood (the agent) had no authority to grant a policy, in contravention of the rules of the Society.' Again, 'it could not be presumed that he had authority *to vary the contract.*' That is to say, the original contract is utterly gone; the plaintiff can only succeed as upon a new contract, but the agent had no authority to bind the company by such. How do the judges answer this argument (for they dispensed with any answer from the plaintiff's counsel)? Is it by holding that a new contract was created in Equity, if not at Law; or that, upon any other special ground of equity, admitting that the original contract was gone, relief should be given? Nothing of the kind. Lord Justice K. Bruce's answer to the counsel is: — 'Did not the plaintiff pay the premiums upon the condition that the policies were to be considered as valid and subsisting?' and, in his judgment, he puts it expressly as 'a waiver of the forfeiture', and gives validity to the act of the agent, upon the ground that, though he had no authority to make new contracts, 'he was their agent, for the purpose of receiving premiums on subsisting policies. The premiums in question were paid to him on the faith of the policies continuing valid and effectual, notwithstanding Bennett's residence in Canada.' Lord Justice Turner uses language precisely similar, and concludes his judgment thus: — 'My opinion is, that these policies must be considered to have been continuing policies.' Nor do I, for my part, understand how these eminent judges could possibly have reasoned otherwise. How could there be a question of Equity distinct from the question of Law? The rules of construction are the same in Equity as in Law. If a Court of Law, construing that policy, would hold that 'void' meant *eo instanti* incurably null,

a Court of Equity, upon the question of construction, must manifestly hold the same; and, so holding, I am not aware of any head of Equity jurisdiction under which the Court would have jurisdiction to re-impose upon the party the very contr ct, from which, by construction of its own language, he had become relieved. Whatever ground there might be for relieving from the forfeiture of the premiums paid, as to which I say nothing, I know of none which would justify the re-imposition of the contract for payment of the insurance money. It is perfectly apparent that the decision only could, as in fact it did, proceed upon the continuance of the original contract, a result which could by no possibility be arrived at, save by adopting that mode of construing the policy then in question, which is contended for by the plaintiff here; and if the plaintiff in that case, instead of suing in his own name (which, as assignee of a *chose in action,* he could of course only do in Equity), had brought an action in a Court of Law, in the name of Bennett's personal representative, the result of that action must have been the same as the suit of Wing *vs* Harvey, at least if that case be well decided at all.

"One of the events specified in the clause in the present case is similar to that which was provided for in the policy in Wing *vs* Harvey; and if here, as there, it had been the only one, and the breach had been of that, the two cases would have been on all-fours with each other. But a distinction exists between them, which has been strongly relied upon, not only as removing the authority of Wing *vs* Harvey, but as constituting in itself a strong substantive ground in support of the defendant's view. In the principal case, several distinct events are prescribed by the policy, as those upon the happening of any of which it shall be void. All, save the first, consist, like that in Wing *vs* Harvey, of matter subsequent to the contract. But the first is matter cotemporaneous with it, and infecting it from its origin, viz., 'fraud in procuring it'; and it is insisted that however the case might be, as to a breach of any of the other conditions, it is impossible to give to the word 'void', as applied to this one, any but its strictest and most severe interpretation.

"Now, looking at the case from this point of view, it at once occurs to ask whether it is possible to give to the same word different meanings, as applied to different branches of the same sentence? Suppose a case came before us to-morrow, of an action upon a policy precisely similar to the present, resisted upon the ground of unlicensed residence abroad, or military or naval service, to which the plaintiff replies the receipt of premiums after knowledge of the event, are we prepared to say that we would hold that policy void? Against doing so, Wing *vs* Harvey would be an authority in point, the former cases would be authorities in principle, and justice and common sense would speak with more authority than either. If then, in a case of a breach of one of the conditions subsequent, we would be bound by authority to adopt the plaintiff's construction, can we now do otherwise than give to the words the same meaning, as regards the other event of the series, to all of which it is, in one and the same sentence, indiscriminately applied? To do otherwise would, in my humble judgment, be to violate one of the most elementary principles of construction; and that, not from necessity or for justice, but capriciously, and in furtherance of the grossest injustice and fraud. The case might be different if there were anything, in the intrinsic nature of the thing forbidden by this branch of the clause, which called for a different mode of interpretation. But the reverse is the fact. It is the nature of fraud, that it vitiates a contract in the absence even of any special stipulation. But it is now well settled that the meaning of that is that the contract is not absolutely void, but only void at the election of the party defrauded. Is not the more rational interpretation then that, as to this particular event, the clause is merely declaratory of the law? If, indeed, no event but fraud were specified, it might plausibly be asked, why insert such a clause at all, unless something more were meant than the law itself would imply? But this argument loses all importance when we find the insertion of the clause naturally accounted for by the expression of other causes of avoidance (all which mean, upon authority, avoidance at election), as well as by the provision for

forfeiture of premiums, which the law would probably not imply, even in the case of fraud. Taking the whole clause as it stands, the rational and sensible interpretation of it is, in my mind, this, that when the insurers stipulate that if there *has been* fraud by the assured, or if there *shall be* default by him in certain other particulars, the policy *'shall be void,'* the true meaning is that it shall be so in the sense in which the law itself says that all contracts shall be void for antecedent fraud, and in which the law has so repeatedly construed contracts, guarding against subsequent misconduct, that is to say, void if the aggrieved party shall so elect; and it is further observable that in no way can these words of futurity, *'shall* be void', have any effect as applied to the original fraud, save by holding that they refer to an election to be made by the company, after knowledge of the fraud.

"If the question in this case were untouched by authority, I believe I should, as mere matter of construction, come to the same conclusion as that at which I have arrived; but, fortified by the authority of Wing *vs* Harvey, fortified as I consider that case to be by the previous cases (even though, strangely enough, they were not cited in it), I have the less hesitation in holding that the true office and function of clauses of this kind in contracts is merely to serve as a shield for the protection of the party who inserts them, if he shall think proper so to use them ; and gross as, upon the averments of this record, must be taken to have been the fraud of the plaintiff in obtaining this policy, I cannot but think hat we should be giving effect to a fraud by this company, far more monstrous, if, after they have, with full knowledge of the fraud that had been practised upon them, deliberately, and for pecuniary considerations, overlooked it, and affirmed the subsistence of the policy, we should suffer them now, after the consequences to the assured have become irreparable, to tell his representatives, his family and his creditors, that during all the time, while they were putting money in their pockets, on the faith of the full validity of the policy, it was in reality utterly null and void.

"For these reasons, I am of opinion that the replication furnishes a sufficient answer to the defence, and that consequently the demurrer ought to be overruled."

VOID EQUIVALENT TO VOIDABLE. — CANADIAN DECISIONS.

As respects the rule of construction by which "void" is read as "voidable" in insurance contracts, the weight of authority in Canada is in line with the decision of Armstrong *vs* Turquand. In fact the only exceptions are three early Ontario cases in which it was held that the rule did not apply to acts of Parliament, and therefore not to cases where the statute under which the company was incorporated, expressly provided that non-disclosure of other insurance, misrepresentation as to encumbrances, and the like, should void the policy. It has now, however, long been definitely settled that this rule of construction applies to statutes as well as to contracts (Maxwell on Statutes, 4th ed. p. 321), subject only to this, that the scope and purpose of the enactment may be so opposed to this rule of construction that it ought not to prevail (Davenport *vs* The Queen, 3 App. Cas. 115). It would appear therefore that even if the statutory conditions obtain some additional sanction by virtue of their being contained in an act of the Legislature, yet any language which voids the policy or limits the liability of the company for breach of a condition must be construed in the same way as it would in an ordinary insurance contract outside the statute.

The insured effected a subsequent insurance, which was in force some 14 days before it was cancelled, and the question was whether or not this was such an insurance as voided the defendants' policy under a condition that if the property insured should be insured elsewhere, notice of such other insurance must be stated in the policy or be indorsed on it, otherwise the insurance should be void. The contention of the plaintiff was that the subsequent insurance was void *ab initio* as the policy contained a provision making it void if there was any other insurance upon the property. As to this Robinson, C. J., says:

"There was an insurance in fact with the Wellington office for a fortnight, and though it is possible that that company may have had reason to complain of some condition in it, yet it would rest with them to take the exception or not as they might think proper. *Primâ facie* it was not void, but voidable, perhaps, at their discretion, and until it was cancelled it was a policy which came within the condition relied upon in the defendants' plea, and of which it was necessary that the defendants should have had notice, and which it was necessary they should have endorsed on the policy, in order to manifest their knowledge and approbation of it."

And Burns, J., says: "The argument on behalf of the plaintiff to support the verdict is involved in two propositions: 1st. That the insurance effected by the plaintiff with the Wellington Mutual Company was in truth no effectual insurance, because it was void *ab initio,* and therefore there was no necessity for the plaintiff giving notice of it to the defendants or having it endorsed on the policy sued on.....

"It is plain the Wellington Mutual Company acted upon the principle of their policy being a subsisting one for those fourteen days. The condition embodied in their policy was for their benefit, and they might or not take advantage of it. If the evidence of the agent of that company be correct, the Wellington Mutual Company could have been compelled to make the contract perfect. The question, however, to be determined here, is not whether the plaintiff could have legally recovered from the Wellington Mutual in an action upon their policy if a fire had occurred during those fourteen days, but it is whether a double insurance *de facto* existed. This point has several times been considered in this court, as in other courts, and that is the meaning which has always been put upon these contracts." (18b)

A policy of insurance provided that in case the premises became vacant the fact should be communicated to the company, and unless such notice was given and the company consented to

(18b) Jacobs *vs* Equitable Ins. C., 19 U. C. R. 250. (1859).

retain the risk, the policy should be void. The house was vacant for some time before the fire, without the knowledge or consent of the company, but after the fire, the company, with full knowledge of the fact, called upon the plaintiff to furnish proofs of loss. The court held that by so doing the company had elected to treat the policy as subsisting, had waived the forfeiture and were not subsequently at liberty to elect to treat it as forfeited. (19)

Mowat, V. C., said: (19a)

"The Insurance Company at the hearing insisteed that there were four grounds of defence to the suit. They contended that the policy had been forfeited (1) by the assignment, and (2) by leaving the premises unoccupied. The assignment, or the leaving the house unoccupied, did not *ipso facto* avoid the policy. In Turquand *vs* Armstrong it was expressly held that the policy in such case was void in case only the Insurance Company, on becoming aware of the breach of the condition, elected to treat the policy as void. The case proceeded on the settled doctrine to the same effect in regard to leases; and the well-known rule in case of leases is, that any act by which the landlord acknowledges the continued existence of the tenancy is a waiver of any previous forfeiture. The acceptance of subsequently accrued rent has that effect. The same result follows from bringing an action for such rent; or making a demand of the rent; or giving a notice to the tenant to repair the demised premises; whether the tenant does or does not repair in pursuance of the notice. The same has been held to be the effect of a conveyance to a stranger which was expressed to be 'subject to the lease.'

"Now it is not pretended that, previous to the manager's letter

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(19) This decision was not followed by the Common Law Courts in so far as it held that calling for proofs of loss was a waiver of forfeiture before loss of a breach of condition of the policy, *infra*, p. 173.

(19a) Canada Landed Credit Co. *vs* Canada Agricultural 17 Gr. 418. (1870).

of the 1st July, the Insurance Company had elected to treat the policy as forfeited and at an end by reason of the premises having been left unoccupied for the three days; or that then or at any time before this suit was brought, an election was made to take advantage of the assignment as a ground of forfeiture. On the contrary, though they were informed of both facts at the same time that they were notified of the fire, instead of electing to hold the policy at an end, they called for, and obtained from the parties concerned, the proofs of loss, on the footing of the policy being still in full force. After this election to treat the policy as subsisting, the Insurance Company was not at liberty to elect to treat is as forfeited."

In another case the facts of which are stated *supra* p. 128, Hagarty, C. J., says: "As to the replication we think it is good. The plea shews matter involving the forfeiture and avoidance of the policy. The answer is in effect that subsequent to the alleged avoidance the company levied another assessment of $7.77 of which the plaintiff was notified, and duly paid the same, all before loss, and so the defendants by their acts, etc., waived the alleged forfeiture, and revived the policy, and ought not to be allowed to plead the said plea.

"This seems to shew a clear revival of the policy—a payment to the plaintiff thereon; and that the defendants cannot be allowed to fall back on a previous default, to destroy the plaintiff's right." (19b)

Proudfoot, V. C., also discussed the earlier Canadian cases and makes use of the following language: (19c) "I further think the defendants have waived their right, if they ever had it, to avoid this policy for non-compliance with the condition as to indorsing or otherwise acknowledging in writing the double insurance.

"Such conditions have generally been construed as rendering the policy not absolutely void but voidable at the option of the

(19b) Smith *vs* Mutual Ins. Co., 27 U. C. C. P., 441.
(19c) Billington *vs* Provincial Ins. Co., 24 Gr., 299.

insurers, and such right may be waived by express agreement or by the acts of the parties."

This decision was subsequently reversed, (19e) but not on grounds which would affect the portion cited above of the judgment in the Court of first instance.

In a case in which the facts were similar to those in Smith *vs* Mutual, supra, pp. 128, 152, Hagarty, C. J., said: (19f) "I do not think the objection should prevail.

"The question is whether, whenever the loss happened, the policy was or was not an existing risk. If the defendants accepted the payments as alleged, whether before or after the fire, I do not see how they can be allowed to fall back on an alleged prior forfeiture in January, 1876. They treat the plaintiff as insured with them, when they called on him to pay for a period long after his alleged default.

"I think the decision of Smith *vs* Mutual Ins. Co., of Clinton, lately decided in this Court, governs this case."

The word "void" was construed as "voidable" by Moss, C. J., using the language following: (19g)

"The primary meaning of the word 'void' is empty. By user it has grown to mean 'null—of no force or effect.' But in Acts of Parliament, deeds, and other legal documents, it is also often used as meaning not absolutely void, but voidable at the option of one of the parties affected...

"The rule modifying the construction of the word 'void', according to the intention of the parties, is particularly applicable to policies of insurance, the conditions of which usually declare the contract void for acts of omission or commission specially provided against by the underwriters."

(19e) 2 A. R. 158; 3 Can. S. C. R., 182.

(19f) Lyons *vs* Globe Mutual Ins. Co., 27 U. C. C. P., 567.

(19g) McCrea *vs* Waterloo County Mutual Fire Ins. Co., 1 A. R., 218.

It was held that default in payment of one of the deferred payments of the first instalment of a premium note given by an insurer in a mutual fire insurance company, under s. 129 of the Act R. S. O., c. 203, (1897), did not *ipso facto* work a forfeiture, and that a notice by the company to the insurer treating the payment as an assessment, and notifying him that in the event of non payment the policy would be suspended, was not an assessment under s. 130, and non-payment pursuant to the notice did not suspend the operation of the policy. (19h)

In an action against a Mutual Ins. Co. the defendants set up an answer that the plaintiff had erected a steam engine on the insured premises, thereby increasing the risk, without their knowledge or consent, which voided the policy under the provisions of the Mutual Insurance Company Act, which expressly provided that if the risk should be increased by any means without the knowledge and consent of the company, the policy should be void.

Hagarty, C. J., in pronouncing the judgment of the court, says: "We do not think that the argument should prevail, that because a statute makes a policy void in certain events, there can be no revival thereof by clear acts of the directors recognizing it as still existing, and dealing with the assured and allowing him to pay money or alter his position on the footing or assumption that he is still insured by them." (20)

Again in giving the judgment of the majority of the court, Burton, J. A., said: "I find a number of American decisions, in addition to those cited on the argument, which appear to bear out the contention of the plaintiff, but they proceed upon a ground which I think is not tenable, namely that the second insurance is absolutely void and never had any legal existence. It appears to me that in assuming that position they lose sight of the fact that this stipulation was made for the benefit of the

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(19h) Woolley *vs* Victoria Mutual Fire Ins. Co., 26 A. R., 321.

(20) Law *vs* Hand in Hand Mutual Ins. Co., 29 U. C. C. P. 1.

Mercantile company and that it was competent for that company to waive it. The policy, by reason of the omission to mention the previous insurance, was not *ipso facto* void but voidable only at the option of the company." (21)

VOID EQUIVALENT TO VOIDABLE. — DECISIONS CONTRA.

There are some decisions which at first blush might be taken to be to a contrary effect.

In one case, the Mutual Insurance Act (6 William IV., c. 18, intituled An Act to authorize the establishment of a Mutual Insurance Co., etc.) under which the company was incorporated, expressly provided that if there should be insurance in any other company, the policy should be deemed and become void, unless the double insurance subsisted with the consent of the company, and Robinson, C. J., in delivering judgment uses the following language:

"No authority has been cited for holding that where a public statute says an insurance shall be deemed and become void on failure of some stipulation inserted in the statute, such provision can be waived by consent of the parties, notice, consent, or verbal or tacit acquiescence. On principle we take it such a waiver cannot be relied on any more in a court of equity than of law, for courts of equity cannot dispense with what a public act of parliament expressly requires. The King cannot do it, nor his courts, we take it. These mutual insurances affect great numbers. If this condition can be waived, why not others? They are for the protection of all who insure, and all who insure their property become members of the company, and liable in respect of all losses upon other insurances. They have therefore an interest in the protection provided by the Legislature, and though the directors represent the members, and can bind them in whatever they do under the authority of the act, they cannot bind them by anything done without or contrary to such authority.

(21) Gauthier *vs* Waterloo Mutual Ins. Co., 6 A. R., 231.

"All who are made members by insuring have an interest in the statute being enforced, and there is no implied authority in the directors to waive all or any of the safe-guards provided in the act." (22)

In another case the defendants pleaded a false representation that the property was unincumbered. The company was incorporated under the Mutual Insurance Act which expressly provided that if the property was incumbered the policy should be void. The plaintiff replied on equitable grounds that by an agreement between him and the mortgagee certain services rendered by him to the mortgagee exceeded the amount due on the mortgage. As to this defence, McLean, C. J., says: "The policy being actually *void* under the statute, and the equitable replication to the first plea, *supposing it to be good,* not being in any way supported or attempted to be supported by evidence, it seems to me quite impossible for the plaintiff to sustain this action. The rule to set aside the nonsuit must therefore be discharged."

Hagarty, J., says: "I do not see how the learned judge at he trial could have done otherwise than direct a nonsuit. The evidence of Mr. Street clearly proved the plea, and brought the case within the act of Parliament, and thus avoided the policy altogether." (23)

In another case the defence was that the property was incumbered, thereby voiding the policy. The plaintiff replied on equitable grounds, setting up the neglect of the defendants' agent to insert the incumbrance properly in the application, and other equitable grounds. The judgment of the court, pronounced by Richards, C. J., after pointing out the provisions of the statute, followed the decision in Merritt *vs* Niagara, above mentioned. (24)

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(22) Merritt *vs* Niagara Mutual Ins. Co., 18 U. C. R., 529.

(23) Muma *vs* Niagara District Mutual Ins. Co., 22 U. C. R., 214.

(24) Johnstone *vs* Niagara District Mutual Ins. Co. 13 U. C. C. P., 331.

These three cases may perhaps be distinguished upon the ground that no other construction could be put upon the Mutual Insurance Act than that the intention of the Legislature was to avoid the policy *ab initio* for non-disclosure of incumbrances or of other insurance, and that these cases fall within the exception stated in Davenport *vs* The Queen, (25) supra, p. 149, where the court, p. 129, referring to the general rule that even in an Act of Parliament the word "void" should be construed as "voidable", says:

"There is no doubt that the scope and purpose of an enactment or contract may be so opposed to this rule of construction that it ought not to prevail, but the intention to exclude it should be clearly established."

If not distinguishable on these grounds, these decisions must be taken to be overruled by the later cases above cited.

Condition against waiver by agents may be waived.

Where the policy contains a condition that agents have no power to waive conditions, this provision is one in favour of the company which it is not bound to act upon, but may in fact confer such authority upon its agents notwithstanding the policy declares to the contrary. Cases do arise where it is a matter to be determined upon the evidence whether the company has not exercised such option and conferred power to waive the condition upon the agent. A case of this kind was Insurance Co. *vs* Norton, 96 U. S., 234. This was a life insurance case.

By indorsement on the policy it was declared that agents of the company are not authorized to make, alter, or abrogate contracts, or waive forfeitures. It appeared at the trial that the premium in question was settled partly in cash and partly by two promissory notes, and each note contained a clause declaring that if it was not paid at maturity, the policy would be void. The agent extended the time for payment.

(25) 3 App. Cas., 115.

The question here was whether the company had authorized its agent to grant indulgence as to the time of paying premium notes, and waive the forfeiture incurred by their non-payment at maturity.

In pronouncing the judgment the Supreme Court of the United States, said: "That it did authorize its agents to take notes, instead of money, for premiums, is perfectly evident, from its constant practice of receiving such notes when taken by them. That it authorized them to grant indulgence on these notes, if the evidence is to be believed, is also apparent from like practice. It acquiesced in and ratified their acts in this behalf. For a long period, it allowed them to give an indulgence of ninety days; after that, of sixty; then of thirty days. It is in vain to contend that it gave them no authority to do this, when it constantly allowed them to exercise such authority, and always ratified their acts, notwithstanding the language of the written instruments.

"We think, therefore, that there was no error committed by the court below in admitting evidence as to the practice of the company in allowing its agents to extend the time for payment of premiums and of notes given for premiums, as indicative of the power given to those agents; nor any error in submitting it to the jury, upon such evidence, to find whether the defendant had or had not authorized its agent to make such extensions; nor in submitting it to them to say whether, if such authority had been given, an extension was made in this case."

There is no uniformity in the judgments of the State Courts in the United States as to whether the company is bound by waiver of this character, where there is no consideration for it, and nothing done by the insured pursuant to it, by which he can invoke the principle of estoppel. Those courts which hold that the waiver constitutes an election by the company to revive the policy, logically also hold that having so elected, the insurance company cannot rescind the waiver.

It is to be pointed out that it has been held in the Supreme

Court of the United States and by the settled jurisprudence of many of the States, that there can be no waiver of the conditions of insurance contracts unless the insured has been misled to his prejudice by the conduct of the company or its agents; in other words, the only *implied waiver* is that which is synonymous with estoppel by representation. This is not the law in England or Canada, as we have above attempted to show.

A policy of insurance contained a condition that if the insured resided in any part of the United States south of the 33rd degree of north latitude, except in California, between the 1st July and the 1st November, without the consent of the company previously given in writing, the policy should be null and void. And the policy declared that agents of the company were not authorized to make alterations or discharge contracts or waive forfeitures. The insured resided in the prohibited district and died there, but on the day previous to his death the wife of the assured, by telegram, had a gentleman in St. Louis go to the agency of the company in that city and pay the premium which was then overdue some eleven days. The money was received by the agent and a renewal receipt given therefor, and on its face continued the policy in force for another year. When paying the money nothing was said to the agent, nor were any inquiries made as to the residence or condition of health of the insured. The receipt contained a notice that where policies became null for non-payment, they might be renewed at the home office within a reasonable time upon furnishing satisfactory evidence of good health, such satisfactory evidence being left to the judgment of the local agent.

Mr. Justice Field speaking for the court, says: (26) "The doctrine of waiver as asserted against insurance companies o avoid the strict enforcement of conditions contained in their policies, is only another name for the doctrine of estoppel, which can only be invoked where the conduct of the companies has been such as to induce action in reliance upon it, and where it

(26) Insurance Co. *vs* Wolff, 95 U. S., 326.

would operate as a fraud upon the assured if they were afterwards allowed to disavow their conduct and enforce the conditions. To a just application of this doctrine it is essential that the company sought to be estopped from denying the waiver claimed should be apprised of all the facts; of those which create the forfeiture, and of those which will necessarily influence its judgment in consenting to waive it. The holder of the policy cannot be permitted to conceal from the company an important fact, like that of the insured being *in extremis*, and then to claim a waiver of the forfeiture created by the act which brought the insured to that condition. To permit such concealment, and yet to give to the action of the company the same effect as though no concealment were made, would tend to sanction a fraud on the part of the policy holder, instead of protecting him against the commission of one by the company."

This decision might have been based upon the principle of waiver as expounded in Wing *vs* Harvey and Armstrong *vs* Turquand, inasmuch as when the doctrine of implied waiver is applied, it is necessary that all the facts should be disclosed to the person against whom waiver is claimed.

Before concluding the discussion of this subject of void and voidable, it is to be pointed out that in a recent case of Liverpool, London & Globe Ins. Co. *vs* Agricultural Savings & Loan (27) Co., discussed in another aspect, supra, pp. 95, 97, 110, there are certain remarks made by Mr. Justice Davies, who gave the judgment of the majority of the Court which might be construed as expressing a different conclusion from that at which we have arrived. In that case the question was what effect the non-disclosure of prior insurance had upon an insurance, the term of which was extended by a renewal receipt, and the Court held that the renewal was not a new contract of insurance, but was based upon the original application, and that where the original policy was void for non-disclosure of prior insurance, the renewal was likewise a nullity, though the prior insurance had ceased to exist in the interval.

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(27) 33 Can. S. C. R., 94.

In this case it was admitted that the company, when it issued the renewal receipt, had no knowledge of the prior insurance which created the forfeiture, and there being no facts upon which the plaintiff could rest a replication of waiver or estoppel, it is clear that he could not succeed in the action whether the policy was deemed to be void *ab initio* or only voidable.

The report of the case contains no reference to Armstrong *vs* Turquand, nor in fact any of the decisions dealing with the construction to be placed upon the word "void", although the point was taken by counsel in argument, but the question did not obtain the consideration it would undoubtedly have received were it necessary for the decision of the case.

Where the policy provides that certain things shall be conditions precedent to the company's liability, such as provisions requiring the action to be brought within a certain time after the loss, these must be strictly complied with. (28)

Implied waiver.

Having considered the rule by which "void" will be construed as "voidable", so as to permit of waiver being set up in answer to a defence of forfeiture, we have next to consider the circumstances under which waiver will be implied.

Waiver before loss of breach of condition before loss.

The insured assigned his policy with the consent of the Company to the plaintiff. In an action thereon defendants pleaded setting up the change in the occupancy of the premises, after the issue of the policy, from a tavern to that of a store. A replication on equitable grounds alleged that the change took place before the assignment of the policy to the plaintiff; that the defendants were, but the plaintiff was not, aware of such change; that the plaintiff was induced by the defendants to pay further premiums in respect of the insurance which the defendants, with

(28) *Vide* decisions under proofs of loss, infra, p. 199.

full knowledge of all the facts accepted from the plaintiff, who was then and continued to be ignorant thereof until after the fire occurred. Held, on demurrer the replication good; that defendants must be held to have waived the alleged cause of forfeiture, and their statutable ratification of the assignment be considered binding upon them, notwithstanding the prior breach of condition by the original assured. (29)

The defendants were a Mutual Ins. Co., doing business on the assessment plan by which, upon the making of the contract, the insured gave a note called a premium note, and was required to pay from time to time such assessment as the company might make thereon, and the statute applicable to the company provided that if any assessment should remain unpaid and in arrear for 30 days, the policy should be absolutely null and void. An assessment was made which the plaintiff neglected to pay, but instead of taking any steps to have the policy declared void, the company subsequently levied another assessment of which the plaintiff was notified, and which he duly paid, and thereby the plaintiff claimed that the forfeiture was waived and the policy revived. In giving judgment the court said:

"This seems to shew a clear revival of the policy—a payment to the plaintiff thereon; and that the defendants cannot be allowed to fall back on a previous default, to destroy the plaintiff's right.

"As to the rejoinder, the defendants assert that no part of the 33 cents first assessed formed part of the second assessment; that before the last assessment the policy had been cancelled, etc., and the second assessment was not in fact made on the plaintiff's policy, but the secretary inadvertently notified the plaintiff thereof; that afterwards other assessments were made before the loss, none of which were notified to the plaintiff; and the defendants thereby offer to return the money paid to them, as mentioned in the replication.

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(29) Kreutz *vs* Niagara District Mut. Ins. Co., 16 U. C. C. P., 131.

"There is no averment that any notice was ever given to the plaintiff, that she had been notified by mistake, or that her money had been received by mistake, nor was it ever tendered or paid back to her.

"On these statements, it appears that the plaintiff, after paying the required assessment, was allowed to consider herself still insured down to the happening of the loss. She is told for the first time, in this suit, that, although her money was taken and retained, and her property destroyed, that she has been for all this time uninsured.

"We hope the law is not so defective as to permit the injustice sought to be perpetrated at the expense of this plaintiff." (30)

The defendants' plea was that they were a Mutual Co. and had made an assessment upon the plaintiff's premium note of which he was notified, and that he failed to pay the same, which voided the policy. The plaintiff filed a replication alleging that a further and subsequent assessment was made by the company on the same note, of which the plaintiff was notified, and which he paid, along with the first assessment. Fire having occurred, the defence was that by non payment of the first assessment within the 30 days provided by the contract, the policy was void. The replication did not state that the payments were made before the fire, and as to this the court said:

"I do not think the objection should prevail.

"The question is whether, whenever the loss happened, he policy was or was not an existing risk. If the defendants accepted the payments as alleged, whether before or after the fire, I do not see how they can be allowed to fall back on an alleged prior forfeiture in January, 1876. They treat the plaintiff as insured with them, when they called on him to pay for a period long after his alleged default.

"I think the decision of Smith *vs* Mutual Ins. Co. *vs* Clinton. lately decided in this Court, governs this case.

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(30) Smith *vs* Mutual Ins. Co., 27 U. C. C. P., 441. (1873).

"The only distinction is, that in the case cited the payment of the further assessment was made and received before the loss.

"The judgment will therefore be for the plaintiff." (31)

It will be noted in this case that Harrison, C. J., in his judgment at the trial holds the replication a good estoppel, and the facts would justify this. But in citing Wing *vs* Harvey in support of his conclusion, he overlooks the distinction between waiver and estoppel. Wing *vs* Harvey was decided on the ground of waiver and not estoppel, as pointed out in Armstrong *vs* Turquand, supra, pp. 138, 149.

On appeal, however, the court, it will be observed, expressly treats the replication as setting up waiver.

The 4th condition of a policy was as follows: "No insurance proposed to this corporation is to be considered in force until the premium be actually paid; and persons desirous of continuing insurances must make the respective payments of the premium thereon, on or before the commencement of each and every succeeding term; otherwise such insurance shall expire. No receipts are to be taken for any premiums of insurance or deposits but such as are printed and issued from the corporation or their agents."

In the judgment of the court it is stated that the local or sub-agents, as they are called, had power to accept risks conditional on the general agent's approval, but valid until refused by him; that he knew and approved of the usage that the agents should receive the premiums *after* the commencement of the risk, they being responsible to him for the amount, and that the contract to renew the policy in question was known to and approved of by the general agent. The renewal premium was not actually paid until some days after the commencement of the term of insurance, but a post card was sent to the plaintiff before the expiry of the old policy, reminding him that it would expire on a certain date and if he wished to renew it to notify the local

(31) Lyons *vs* Globe Mutual Ins. Co., 27 U. C. C. P., 567.

agent. The plaintiff sent a notice asking renewal and received a reply that the policy was marked renewed. A loss having occurred, the company set up as a defence the above mentioned 4th condition, but the court held that the condition had been waived. (32)

An insurance company defended an action on several grounds. First, that under a condition indorsed on the policy making it void "if the said property should be sold or conveyed, or the interest of the parties thereon changed, or if the policy should be assigned without the consent of the company obtained in writing therein", the policy had been forfeited by the insured giving a bill of sale of the property to a firm of McAllister & Mott, the local agents of the company at Campbellton, N. B., and afterwards making an assignment for benefit of his creditors of all his property, mentioning expressly all policies of insurance. Secondly, that the policy had been cancelled before loss by notice to the insured as authorized by a condition therein. Thirdly, that proofs of loss had not been given to the company within the time limited therefor by the policy.

In giving judgment the court said: "We are all of opinion that the judgment pronounced by the Supreme Court of New Brunswick in this case was quite correct, with one exception. There is no doubt that the bill of sale to McAllister & Mott was 'a change of interest' which avoided the policy under the first condition. The insured claimed that this forfeiture was waived, but McAllister & Mott, being agents only for the purpose of receiving applications and forwarding them to the head office, had no authority to waive it, and Whittaker, the resident secretary, and the only person whose acts could bind the company, knew nothing of the bill of sale having been given, and could not be said to have elected to treat the policy as in force after a forfeiture of which he was ignorant." (33)

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(32) Peppit *vs* North British Ins. Co., 1 R. & G., 219.

(33) Torrop *vs* Imperial Ins. Co., 26 Can. S. C. R., 585.

WAIVER AFTER LOSS OF A BREACH OF CONDITION BEFORE LOSS.

The plaintiff neglected to pay an assessment upon his premium note, as provided for by the contract and by the statute. In August of the following year a further assessment was made, and on the 21st September the plaintiff was served with the usual notice claiming the former unpaid assessment and interest thereon, and the new assessment, and by the notice the plaintiff was informed that unless the above sum should be paid within 30 days as required by the terms of the policy, the insurance should be void. The fire took place on the 17th October, and the plaintiff did not pay or tender the above amount until long after the fire and after the 30 days had expired. But in the January following, the plaintiff tendered the amount due for assessments, and the company accepted the same believing themselves entitled to do this without waiving the forfeiture of the policy. As to the rights of the parties, Gwynne, J., in giving the judgment of the court, said:

"At the time of the fire his position would seem to have been in so far as relates to the non-payment of the assessment, that he would be entitled to recover under the policy if he should pay the assessment within the time pointed out in the Act.

"Whether the defendants, the loss having occurred before the expiration of the time within which the plaintiff could have paid the assessment so as to preserve the policy in force, were obliged to look merely to the amount payable to the plaintiff for payment of the assessment, and so upon the loss occurring time could no longer run against the plaintiff so as to cause a forfeiture of his policy, if he should not pay within the prescribed time, is a point which has not, we believe, heretofore arisen. The plaintiff does not appear to have acted upon any such belief, for upon the 27th of January he pays the assessment.

"Now if the loss occurring during the 30 days given to the plaintiff to pay the assessment after receiving notice, did not stop the further running of time against the plaintiff then the policy was avoided for non-payment of the assessment upon

about the 23rd October 1876, and in such case it would seem that under the Act the defendants might have sued for such assessment at any time after the expiration of thirty days from notice of the assessment having been given, and have recovered the same with costs of suit without waiving any forfeiture arising from non-payment of such assessment.

"The revival of a policy upon payment of an overdue assessment mentioned in the 44th section of the Act, would seem to be a revival before at least a total loss, for upon a total loss occurring the policy can have no continuing vitality by way of protection against loss, but exists only as affording a cause of action for aloss incurred. The term 'revival' points rather to the continuance of a policy as a security against loss not yet suffered, than to a right of enforcing a policy by suit after loss already suffered.

"To hold that the payment after loss of overdue assessments, the non-payment of which constituted a statutory forfeiture, should revive a cause of action already lost by the forfeiture of the policy, would be a decision very different from that in Smith *vs* Mutual Ins. Co., of Clinton, 27 C. P., 441.

"In that case we held that the levying a subsequent assessment upon the insurer's premium note after a forfeiture for non-payment of a previous assessment, and the accepting payment of these two assessments before any loss had happened, constituted a revival of the policy as a continuing security. There the acts of levying the subsequent assessment and of accepting payment of it and of the previous assessment, default in payment of which latter constituted the forfeiture relied upon, were inconsistent with the forfeiture relied upon. And we held that the company could not get rid of the effect of such acts of their own by alleging that their officer had levied the subsequent assessment and accepted payment of both by mistake, because their acts had led the insured person naturally to rely upon the policy as a subsisting security against the loss which subsequently happened. But the acceptance after total loss of a debt due, loss or

no loss, is not inconsistent with a reliance upon a forfeiture occasioned by non-payment of the assessment so received within the prescribed period limited by statute, and the acceptance of such a debt after total loss could not in any manner mislead or injuriously affect the person paying it. So that to our mind it does not appear that the payment in this case of the assessments made before loss, upon the 27th of January, 1877, more than three months after the happening of the loss, can by mere force of law be treated as a waiver of the forfeiture occasioned by non-payment of the assessment within the statutory period prescribed after the insured received notice of the assessments; but we are clearly of opinion that the receipt of such overdue assessment cannot be held to operate by force of law as a waiver of a forfeiture incurred by reason of the plaintiff having effected the subsequent insurance without notice to and the consent of the defendants, such a forfeiture having no connection whatever with the payment or non-payment of assessments made upon the insured person's premium note." (34)

One of the conditions of an insurance policy provided that if the insured had at the time of the policy, or should have afterwards, any other insurance without the consent of defendants written on the policy, the policy should be void.

The plaintiff relied upon a waiver of this condition by defendants' inspector, whose duty was described as being "to examine into the circumstances, to adjust the loss, and to settle or report to the office."

A nonsuit having been ordered upon the ground that the condition could not be waived by the inspector, or in any way except in writing:

Held, that the nonsuit was right upon the evidence; and the Court refused to set it aside.

Per Wilson, J.: "The learned judge nonsuited the plaintiff because 'the conditions could not be waived by the inspector, or in any way except in writing.'

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(34) Lyons *vs* Globe Mutual Fire Ins. Co., 28 U. C. C. P., 62.

"It was said at the trial 'the duties of the inspector are to examine into the circumstances, to adjust the loss and to settle or report to the office.'

"That description of the position which Mr. Marr, the inspector of the defendants, filled in their service, and of the duties that devolved upon him, and of the powers exercisable by him as such officer, does not necessarily give him the right to waive conditions favourable to the company, unless the waiver relate distinctly to some matter in and over which he can exercise such power.

"It is said the inspector is to adjust the loss — that is, to examine the books of account and vouchers, and to make all due enquiries of the insured and of his employees as to the value of the goods insured which have been destroyed or injured, to determine probably whether the goods claimed for come within the description of those insured, the extent of the loss sustained, how much is total and how much partial, the value to be set upon the different kinds of loss; and generally to do all such acts as will enable him to arrive at a fair estimate of the damage sustained.

"Now, suppose there was a condition on the policy that in adjusting the loss the insured should deliver to the inspector or agent of the company engaged in the adjustment, an account or statement in writing of the various matters which the inspector should require him to furnish, and if he did not do so that the policy should be void.

"I shou'd say, without hesitation, that if an adjustment were made by the agent without a statement in writing such as the condition required being furnished by the insured, and without the agent requiring any such statement because he was willing and content to do without it, that the adjustment so made—free from fraud or collusion, of course—would be binding on the insurers, because that would be an act within the line of duty and powers of such an agent to deal with.

"But when such a person assumes to dispense with conditions relating to the keeping of prohibited or highly hazardous goods,

or largely in excess of the allowable quantities, or to a misdescription of the mode of heating, or the precautions required in case of steam being used, or with respect to chimneys or stove pipes, or the deposit of ashes or the proximity of dangerous places, and the like, a different question is certainly presented.

"In Gale *vs* Lewis, 9 Q. B., 730, an agent of an insurance ompany, who receives 'instructions on behalf of the company for policies, transmits such instructions to the office, receives and pays over premiums, settles accounts for losses, (on remittances from the company) keeps an account current with them, and pays agency fees'; does not seem to have been considered as a person authorized to receive notice which could bind the company that an insurance effected was not for the benefit of the insured, but in fact for another, who required the insurance to be made as security for money lent to the insured, and to whom it was immediately assigned, and so that the policy was not in the order and disposition of the insured at the time of his bankruptcy, but belonged to this particular creditor.

"On a second trial the jury expressly found' that the company had authorized the agent to receive notices of assignment for them, and had consented that notice so received by him should be equivalent to a notice served upon the company at their office.'

"In that case the agent resided at Tiverton, the company's office was at Exeter, and they had persons acting for them in the like manner at other places.

"The powers and duties of the agent in the case just mentioned made a sufficient case to go to the jury, whether he had the assignment of a policy so as to bind the company, although the company had not in fact notice of the transaction.

"The case referred to was not one in which there was any such condition, as in the present policy, that the consent of the company to any further assurance should be expressed by writing on the policy, otherwise the policy should be void...

"I should have been glad to have the opinion of the jury whether Marr, the agent, had the power to waive such a condition.

If the fact had been found for the defendants the result would have been more satisfactory; but I am not sure whether we might not have been obliged to interfere if their finding had been for the plaintiff upon this point." (35)

This following case was heard on demurrer, the pleas alleging that the plaintiff had represented that certain stoves and pipes were in good condition and not in contact with the wood of the building, and that the plaintiff had warranted the truth of this statement, whereas the representation was false and fraudulent to the knowledge of the plaintiff, whereby the policy became void. To this the plaintiff replied that the defendants, after they had full notice and knowledge of the false representation and breach of warranty, and after the loss by fire sued on, had made a levy on the plaintiff's premium note payable within 30 days, and notified plaintiff thereof, and that he had paid the said assessment, whereby the defendants had waived the voidance of the policy and renewed and continued the same. In giving judgment, the court said: "I decide against the defendants on the ground that the company having full knowledge of certain alleged breaches of warranty as to management of stove pipes, etc., elected, as I consider they lawfully could, to treat the insurance as existing, by calling on the plaintiff to pay an assessment for a long period after acquiring such knowledge, and notified him to pay within a named time, or that in default of payment his insurance would become void. This is treating him as still insured. It is true that the assessment is stated to have been made after he loss (it does not say after knowledge of the loss). But on this pleading we need not consider anything that may come out in evidence as to the manner in which the defendants accepted and received the payment from the plaintiff, nor with what knowledge or under what circumstances the assessment was placed on him and notice given to him. On this record the plaintiff might, I presume, recover for a partial loss. I think the replication answers the plea." (36)

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(35) Mason *vs* Hartford Fire Ins. Co., 37 U. C. R. 437.

(36) Hopkins *vs* Manufacturers, etc., Fire Ins. Co., 43 U. C. R., 254.

One Street, having a house in course of erection, applied to the company's agent for an insurance, and at the same time negotiated a loan with the plaintiffs, giving in security therefor, the land covered by the mortgage, and a policy for $700 which he had applied for in the defendant company. The loan company refusing to advance all the money covered by the mortgage until they received the policy, Street applied to the insurance company's agent, and representing the matter as pressing, obtained a certificate stating that the property was insured for $900, and handed it over to the solicitors for the mortgage company, who paid over the balance of the loan, assuming that the assignment of this policy would, as in other cases, be sanctioned by the insurance company in due course. The insurance company, afterwards executed the policy and sent it to Street. The plaintiff's solicitor thereupon wrote to the insurance company about having the policy assigned, and the company wrote to their agent at Owen Sound enclosing the letter from the plaintiffs' solicitor and saying that there was a form of assignment on the back of the policy and that if this was signed by Street in the presence of a witness and transmitted to the head office with $1, that the manager would confirm the assignment, and return the policy to Street, or forward it to the plaintiffs' solicitor, as might be desired. The manager stated in his evidence that transfers were not usually submitted to the Board, and that he had authority to confirm them in the usual course of business. Owing to the insurance agent having removed from Owen Sound before the letter from the manager arrived, the matter of assigning the policy was delayed, but Street executed the assignment, the plaintiffs' name being inserted as assignees, but neglected to forward it to the defendant company and left the country on the 8th March, leaving the house vacant. On the 11th March the house was destroyed by fire.

The company subsequently wrote to Street's father enclosing certain affidavits to be filled out in connection with the loss, and directing that the assured in his affidavit should mention the assignment of the policy to the plaintiffs. These affidavits

were at first defective. Further affidavits were called for, but at length all the requisitions of the insurance company were complied with. After all this had been done, the company notified the plaintiffs that they would not recognize the assignment of the policy and that the assured had forfeited his house by leaving it vacant.

Blake, V. C., held (37) that having called for and obtained proofs of loss on the footing of the policy being in full force, the company had elected to treat the policy as subsisting, and as not at liberty subsequently to elect to treat it as forfeited.

The last case, however, was not followed by the common law courts, in the two next following cases.

It was held, that where the proofs of loss were insufficient, the fact that the company, after receiving the proofs, did not notify their objections to the plaintiff, could not be considered a waiver of such objections. (38)

One of the questions for determination was whether the demand of claim papers and proofs of loss, without reference to the fact that by reason of vacancy, the policy was void, could be construed as a waiver.

In giving judgment, Harrison, C. J., after referring to Canada Landed Credit Co. *vs* Canada Agricultural, 17 Gr. 418, in which it was held that by calling for proofs of loss the company had waived the condition of the policy as to non occupancy, says :

"But the defence of non-occupation in that case was, according to the report, open to another answer which was so conclusive as to render unnecessary this expression of opinion. Besides, as pointed out by Hagarty, C. J., in Stickney *vs* The Niagara District Fire Ins. Co., 23 C. P., 372, 382: 'In the report of the case none of the numerous cases in our Common Law Courts are noticed.' Hence the learned Chief Justice said: 'I do not

(37) Canada Landed Credit Co. *vs* Canada Agricultural Ins. Co., 17 Gr., 418.

(38) Stickney *vs* Niagara Mutual Ins. Co., 23 U. C. C. P., 372. *Vide* also Soupras *vs* Mutual Fire, 1 L. C. T., 197.

feel at liberty to lay down any such rule, and must leave it to the Court of Error to declare if it be the law.'

"No such rule has ever prevailed in Courts of Common Law in this Province. In many cases which I remember, and could name if necessary, there was not only the defence of insufficient proof of loss, but a condition making void the policy, and correspondence about the former without any reference to the latter, and no question of waiver ever raised or attempted to be raised.

"If such a rule as suggested by the learned Vice-Chancellor is to prevail, it must be enacted by the Legislature or established by the Court of Appeal." (39)

One of the pleas to the declaration was that a by-law of the defendant company required that notice of subsequent insurance should be furnished to the secretary of the company within 10 days, and the consent of the Board obtained thereto, otherwise the policy should be void, and that there had been subsequent insurance without notice. A replication to this plea was that the company, after the happening of the loss, and after they had notice of the additional insurance, waived the benefit of the condition contained in the said by-law by requiring from the assured further proofs of loss, and it was contended that the provisions of 38 V., c. 65, relieving the assured who failed to comply with the provisions with respect to proofs of loss by necessity, accident or mistake, deprived the defendants of the right to insist that the policy was void.

It was held that the equitable replication afforded no answer to the plea. (40)

The jurisprudence in Quebec, however, appears to be the same as that expressed by the Court of Chancery, in Canada Landed Credit Co. *vs* Canada Agricultural Ins. Co., supra, pp. 151, 173.

By the condition of a policy of fire insurance, the insured was required, on pain of forfeiture, to notify the company of any

(39) Abrahams *vs* Agricultural Mutual Assurance Ass., 40 U. C. R. 175.

(40) Fair *vs* Niagara District Ins. Co., 26 U. C. C. P., 398.

other insurance effected on the property. The company, after the fire, and after knowledge that other insurance had been effected, supplied forms for making claim, and joined in an arbitration to settle the amount of damage, and otherwise treated the contract as binding on the company.

Held, that this was a waiver of all objection based on the condition requiring notice of other insurance. (41)

THE WAIVER MUST BE MADE BY THE COMPANY ITSELF OR ITS AUTHORIZED AGENT.

After effecting the insurance in question, the plaintiff obtained a further insurance in another company, of which he notified the defendants' agent, but such other insurance was not indorsed on the defendants' policy, nor was the company aware of the same until after the loss. A loss having occurred, the official adjuster or inspector of the defendant company, adjusted the damage. The insured had several interviews with the agent of the company, and the inspector, both of whom knew of the other insurance, but at no time was payment of the loss objected to on the ground of double insurance. On one occasion the inspector told the insured that the company would pay, and that the delay was occasioned by another company with whom the insured had a policy previous to insuring in the defendant company. The plaintiff's contention was that the company, through its agent and inspector, had waived a breach of this condition. As to this Ritchie, C. J., says:

"This subsequent insurance was not at once notified to the company in writing, nor was it endorsed on the policy in suit granted by the company or otherwise acknowledged in writing, in default whereof the policy thenceforth ceased and became of no effect.

"The respondents contend that the appellants waived this condition, and are stopped from setting it up. It is not and cannot

(41) Fonderie de Sorel *vs* La Comp. d'Assur. de Stadacona, 6 L. N., 277; 27 J. 194; 14 R. L. 137.

be, contended that the company, with knowledge of this insurance waived the condition in respect to it, for previous to the loss it does not appear to have been called to their notice; in fact, the head office had neither notice verbal or written, nor actual cognizance of such further insurance.

"But it is contended that the condition was waived by their agent, or inspector, or both, neither of whom, however, in my opinion, had any authority to dispense with the performance of this condition, if they really attempted or intended to do so, which is more than doubtful."

Strong, J., says: "It is not alleged nor is it proved that it was within the authority of the local agent to receive such a notice, and decided cases have determined that a condition of this kind requires that notice should be given to the company directly through its managing officers at its head office. Gale *vs* Lewis (9 Q. B. 730); Mason *vs* Hartford Ins. Co. (37 U. C. Q. B. 437). Moreover, the terms of the condition show that beyond giving notice, the subsequent assurance must be indorsed on the policy or asknowledged in writing; the words are 'in default whereof such policy shall thenceforth cease and be of no effect.' It is neither pleaded nor proved that any notice was given to the company in the manner required, nor that the subsequent policy was endorsed or otherwise acknowledged in writing, which by the express stipulations of the policy was to be the only evidence of the appellants' consent to continue the risk after a subsequent policy had been effected.....

"The question as to the sufficiency of the respondent's answer to the defence raised upon this sixth condition is therefore reduced to one of waiver. It is not shewn that it was within the scope of Greer's authority as a local agent to waive such a condition. The condition itself does not, either by express words or by implication, recognize such an authority, but the reason for requiring the notice obviously points to a directly contrary construction. Moreover, the English case (Gale *vs* Lewis) already quoted, which determines that the required notice is to be given to the company itself and not to the local agent, shows,

a fortiori, that such an agent has in the absence of express authority no power to waive the condition.

"But the Court of Appeal held otherwise, and determined that in such a case notice to the agent was not given to the company, and that the agent neither had authority to waive the condition nor could by his conduct estop his principals the first insurers. As regards any direct action of the appellants through their immediate agents, the directors or principal officers of the company conducting its affairs at the head office, there is no pretence for saying that there is in the present case the slightest evidence of conduct upon which either a defence of waiver of the condition, or by way of estoppel against insisting upon it, can be based, and this for the very plain reason that these directors and officers never had the fact of a subsequent assurance brought to their knowledge; and without proof of such knowledge neither waiver nor estoppel can be made out.....

"As regards proofs of loss I should have no difficulty in holding that the adjuster had authority to waive them, for as the first step to be taken by him in investigating the loss would have been to call for the proofs he must have had, by implication, power to dispense with such proofs, or to accept such proofs short of those actually required by the conditions, as might seem to him sufficient. But as regards breaches of conditions which had vitiated the policy long before the loss, these he could have had no more power to waive that he had to waive a defence *extra* the terms and conditions of the policy altogether, such as fraud in the inception of the contract or want of interest invalidating the policy *ab initio*." (42)

The condition usually endorsed on policies of insurance respecting double insurance, is binding in law and its performance will not be held to be waived by the company if their agent, on being notified of such double insurance after the fire, make no specific objection to the claim of the assured on that ground. (43)

(42) Western Assur. Co. *vs* Doull, 12 Can. S. C. R. 446.
(43) Western Ass. Co. *vs* Atwell, 2 L. C. J., 181.

WAIVER AFTER LOSS OF BREACH OF CONDITION AFTER LOSS.

Where there was no statutory provision relieving the assured from complying strictly with the conditions of the policy, the courts formerly, both in England and in Canada, held that the condition as to proof of loss was not to be strictly construed, and were astute to seize upon any circumstances from which waiver might reasonably be inferred. This was most equitable because, however important it might be to hold the assured closely to the conditions, a breach of which might seriously affect the risk which the company undertook, no such reason applied after the loss occurred, and where the delay in making proofs could only be of importance in preventing a prompt adjustment of the claim. And even if there might be a reason for requiring a prompt notification of the loss on the ground that delay might prejudice the company in obtaining evidence as to the honesty of the claim, it could not be said with equal force that the company ought to be discharged from liability where there had not been a perfect compliance with the provision which required particulars and proofs of loss to be furnished within a fixed period.

In the recent decisions, however, of the Supreme Court of Canada, (infra, p. 199) all provisions of this kind have been treated without any liberality, and where there has not been a rigid compliance with the provisions of the policy in this regard, the plaintiff's action has been dismissed.

A condition in a policy of insurance provided that "whenever any fire shall happen the party insured shall give immediate notice thereof, etc., and within three calendar months deliver, etc., accounts exhibiting the full particulars and amount of the loss sustained."

In pronouncing the judgment of the Court, Pollock, C. B., said: "By the contract of the parties, the delivery of the particulars of loss is made a condition precedent to the right of the assured to recover. It has been argued that such a construction

would be most unjust, since the plaintiff might be prevented from recovering at all by the accidental omission of some article. But the condition is not to be construed with such strictness. Its meaning is, that the assured will, within a convenient time after the loss, produce to the company something which will enable them to form a judgment as to whether or no he has sustained a loss." (44)

The plaintiff effected an insurance on the property in question, to the amount of $800, viz., on grain, flour, and fixtures, consisting of working tools. On the 11th of August, the mill in which the property was, was burned, and the property therein destroyed. On the 25th September, the plaintiff sent to the defendants a statement of the loss, sworn to by the plaintiff, and verified by the oath of a person who was employed in the mill. The statement contained a detailed account of all the property burnt, viz., all property within the terms of the policy, and other property. The Court said: "It was objected that the statement was not furnished within thirty days. If there was anything in the objection, I think from the evidence the delay was occasioned by the agent of the company promising the plaintiff that a blank form for the statements would be ent to him for that purpose, which was never sent, and in that way occurred the delay. The mere fact of the statement being sent in a few days after the thirty days elapsed, does not under the condition void the policy, or defeat the plaintiff's claim. (45)

Similarly in Lampkin *vs* Ontario Marine Ins. Co., (46) the notice of loss and particulars were not in time, but there was correspondence between the insured and the company as to better particulars. The company had two policies, one on the buildings and one on the contents. Subsequently the company paid the loss on the buildings, but resisted the balance of the claim.

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(44) Mason *vs* Harvey, 8 Exch., 819.

(45) Hutchinson *vs* Niagara District Mutual Fire Ins. Co., 39 U. C. R., 483.

(46) 12 U. C. R., 578.

As to this the court said: "The result of the cases there" (in the United States) "is that both the notice of the loss and the particulars of it may be waived by the insurers expressly or by their conduct in dealing with the assured. That view seems to be reasonable and consistent with the law upon other subjects."

And as to the defective notice: "If it were in time or waived as regards time of giving it in respect of the buildings, it would seem strange to hold it not waived as regards the goods in the same building."

And proceeded: "Taking the facts of the correspondence in respect to furnishing better evidence of the particulars and not setting up the want of sufficient notice till the action brought, and then, after the action is brought, the payment of the amount insured upon the buildings, into consideration, we think it sufficient to hold that in law the defendants were precluded at the trial from disputing their liability."

THE COMPANY MAY WAIVE A CONDITION AS TO PRESCRIPTION.

The policy required that the action should be brought within six months from the time of the loss and it appeared that an agreement had been come to between the plaintiff and the Company's Canadian agent that if the plaintiff would not prosecute his right at law until the return from England of one Scott, the defendants would pay the claim, and would take no advantage of the limitation clause.

Chief Justice Wilson, in referring to Lampkin *vs* Western Ass. Co., distinguishes it, because in that case the policy was under seal, and in this case it was not, and that in the former case the waiver could only have been by deed. He also says, page 603: "I see no reason why the statutory defence by lapse of time might not be expressly agreed to be waived for forbearance or for any other good consideration, nor why such waiver might not be replied to a plea setting up the defence, and I see no reason why it may not equally be relied on against any conventional period of limitation. I think then the waiver, if made by a competent person to bind the company, valid at law."

And holds, finally, as follows: "I think this agent, the manager for the Company in Upper Canada, had the power to stipulate for the indulgence which he gave, and to bind the Company not to take any advantage of the plaintiff for the indulgence which he gave them." (47)

NEGOTIATIONS WITH A VIEW TO SETTLEMENT. — EFFECT OF.

It was a condition of the policy that no action or suit, either at law or in equity, should be brought against defendants thereon after the lapse of one year from the loss, this being a condition also prescribed by 36 Vict., c. 44, s. 54 (0), relating to mutual fire insurance companies. The plaintiff, suing on this policy, after the expiration of the year, declared on equitable grounds, alleging in one count that defendants prevented the plaintiff from suing in time by an agreement that if the plaintiff would permit and give them time to examine his books, etc., they would pay as should thereupon be agreed, provided the plaintiff would refrain from suing during such examination, and while negotiations should be pending; and that in consideration thereof defendants would waive the condition. The second count alleged that defendants prevented plaintiff from suing, by representing that notwithstanding they had good defences to urge, they would pay what they should find to be really due on an investigation of the plaintiff's books and accounts, etc., if the plaintiff would give them sufficient time therefor, and would not sue during such investigation. It was then averred that such investigations and negotiations with the plaintiff continued until after the year, when it was agreed that defendants should pay the plaintiff $500 in full, which they had not paid. The fire took place on the 18th August 1874. The claim papers were sent in on the 15th September. On the 28th October, the plaintiff was required to produce his books, invoices, and vouchers, etc. He then placed his claim in the hands of an attorney, who wrote to defendants, and was told that without the books there could be no settlement. On the 26th February, 1875, the

(47) Brady *vs* The Western Ass. Co., 17 U. C. C. P., 597.

plaintiff authorized certain creditors of his to settle the claim as they might think proper. These creditors employed other attorneys, who wrote to defendants on the 10th April threatening a suit, after which defendants' general manager called on them and had an interview "without prejudice", in which he made an offer of $500, which was not then accepted. On the 20th April the attorneys wrote to the manager offering to take $800, and saying that unless the claim was settled at once they would sue on the policy. On the 26th April the board met, when this offer was declined, and the manager who was called by the plaintiff, swore that this decision of the board was at once communicated to the attorneys. Nothing more took place until the 18th September, when the attorneys wrote accepting the offer of $500. The defendants took no notice of this, or of a subsequent letter of the 15th November, and the action was brought on the 9th December. One of the attorneys who was also junior counsel for the plaintiff at the trial, being called as a witness, swore that a few days after the letter of the 20th April the manager called on them, talked of a settlement, for which he seemed anxious, and said that if two other companies interested would each pay $100 more, defendants would do so as well. One of the attorneys denied notice of the resolution refusing their offer of $500 but admitted that the manager told him then that defendants declined it. No mention was made of the limitation clause during the negotiation.

Held, that there was no evidence to go to a jury either of the agreement alleged to pay $500, or that the defendants prevented or waived the performance of the condition, or of anything which could in equity prevent defendants from insisting on the forfeiture. (48)

SUBMITTING TO ARBITRATION MAY OPERATE AS A WAIVER.

The contract of insurance contained a provision that "le montant de dommage à la propriété peut être déterminé par accord

(48) Davis *vs* Canada Farmers' Mutual Ins. Co., 39 U. C. R., 452.

mutuel entre la compagnie et l'assuré", and also the following provisions:

" L'assuré devra, toutes les fois qu'on le lui demandera, produire pour examen à toute personne ou personnes nommées par cette compagnie tout ce qu'il reste de la dite propriété endommagée ou non endommagée."

" L'assuré devra, chaque fois qu'il en sera requis, se soumettre à un ou des examens par toute personne nommée par cette compagnie, et devra signer et assermenter, devant quelque personne dûment autorisée à prendre ces déclarations sous serment à cet égard, les déclarations faites dans tel examen, quand elles ont été consignées par écrit."

The company " ne sera pas jugée de s'être désistée d'aucune condition, à moins que ce désistement ne soit clairement exprimé par écrit et signé par un agent de la compagnie."

No proofs of loss having been furnished, a plea setting up this as a defence was rejected, the court holding that the company had waived compliance with this provision in that the agent specially sent to adjust the loss, in reply to a suggestion by the plaintiff as to naming arbitrators, had said "que c'était une dépense inutile, et il l'a prié de faire lui-même, avec un homme, le compte des pertes, et de le lui envoyer, et que, si tout été satisfaisant il le payerait." (49)

To an action on a policy of insurance, the appellant pleaded that other insurances were effected on the property without notice to the company, absence of proper preliminary proof and fraudulent overvaluation.

The court below held that the company got sufficient notices of the other insurances and that the objections arising out of irregularities in the preliminary proofs had been waived by the conduct of the company after the fire. On appeal it was held:— That a company receiving preliminary proof and with knowledge of all the facts, joining in an arbitration, without having

(49) Duffy *vs* St. Lawrence Ins. Co., Q. R., 23 S. C., 181.

made any objection, waived the right to object and could not raise the point afterwards. (50)

One Hobbs was the general agent in Canada for the Insurance Company, and after the loss in question occurred, along with another company, the London & Lancashire Ins. Co., submitted to arbitration the amount of the loss, the two arbitrators as "arbitrateurs et amiables compositeurs." The arbitrators appraised the goods and made an award that half the loss should be paid by one company and half by the other. Hobbs, dissatisfied with the award, as it disposed of a matter which he did not intend to be adjudicated by the arbitrators, namely, as to whether his company was liable at all for certain of the goods destroyed, called for information and explanations from the insured, and for the first time became aware of an insurance with a third company, the Liverpool & London Ass. Co. The arbitrators ordered a sale, and Hobbs not only assented to the sale, but consented to the payment over of half of the proceeds to the respondent. Subsequently, Hobbs took objection to his liability on the ground of the non-disclosure of the policy in the Liverpool & London Ass. Co. As to this the court held that the want of indorsement upon the Lancashire policy of the insurance in the Liverpool Company, unless waived, voided it, but held that the circumstances which afterwards took place amounted to a waiver of that objection, the waiver being, among other things, by the payment to the respondent out of the proceeds of the sale above mentioned.

As to the authority of Hobbs, the general agent in Canada, the court said: "He was a general agent for the English company in Canada. He was the only agent, as far as appears, the company had in Canada. He seems to have managed all the insurance business in Canada in all its branches, and in every way. If it were sought to show that although in general manager and agent, he had not the necessary authority to make this waiver, the question of waiver having been agitated from the beginning of these proceedings, it lay upon the present appellants to estab-

(50) Canadian Mutual Fire Ins. Co. *vs* Donovan, 2 L. N., 229.

lish this limitation of his authority by evidence or otherwise." (52)

The plaintiffs (respondents) had insured their ship with the defendants (appellants) and, a loss having occurred, the matter was submitted to arbitrators and *amiables compositeurs* appointed. The respondents contended that the following clause : — "It is expressly understood that this appraisement is for the purpose of ascertaining and fixing the amount of said loss and damage only, to the property hereafter described, and shall not determine any other right or rights of either party to this agreement," had not the effect of relieving the plaintiffs from any of the conditions of the policy.

Held, that whatever the effect of the clause quoted, the fact that the respondents submitted the matter to arbitration, was an admission that the fire had taken place and that a loss had been suffered by the plaintiffs and that this admission supplied the notice and proof of loss called for by the conditions of the policy. (53)

A policy of marine insurance contained the following : "In case the premium, or the note, or other obligation given for the premium, or any part thereof, should be not paid when due, this insurance shall be void at and from such default; but the full amount of premium shall be considered as earned, and shall be payable, and the insurer shall be entitled to recover for loss or damage which may have occurred before such default. Should the person or any of the persons liable to the company for the premium, or on any note or obligation given therefor, or any part thereof, fail in business or become bankrupt or insolvent before the time for payment has arrived, this insurance shall at once become and be void, unless and until before loss the premium be paid or satisfactorily secured to the company."

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(52) Lancashire Ins. Co. *vs* Chapman, Judgment of the Privy Council, reported 7 R. L., 47.

(53) Richelieu & Ontario Navigation Co. *vs* Commercial Union Ass'ce Co., Q. R. 3 Q. B. 410.

A promissory note for the premium was not due when the insured became insolvent, and made an assignment, and a guarantee was then given and accepted by the company as a satisfactory security for the premium. When the note became due it was not paid either by the insured or by the grantor, and remained unpaid at the date of the loss.

Held per Strong, J., that by reason of the non-payment of the note at maturity, the policy became void, but as the company had submitted to arbitration and the declaration contained a count based upon the award, and no objection was made to the award, the defendants had waived any defence based upon the default in payment of the premium. (54)

ASKING FOR PROOFS OF LOSS MAY OPERATE AS A WAIVER OF NOTICE OF LOSS.

The plaintiff did not literally give notice in writing of the fire, but he informed the defendants' agent of it and asked him to notify the head office, which he did. The resident secretary got the agent's letter of notification, acknowledged it, and directed the agent to get plaintiff's proofs. This was held to be a waiver of the condition requiring notice of the fire to be given by the assured in writing. (55)

KEEPING SILENT NOT NECESSARILY A WAIVER OF DEFECTIVE PROOFS OF LOSS.

When giving judgment, the court in one case said (55a): "Counsel strongly urged that the defendants had waived all objections to the sufficiency of the proofs. The only apparent ground for such an argument was, not that defendants said, or wrote, or did anything to waive objections, but that having received the plaintiff's papers in January, they remained silent for some months, till the action was brought in August."

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(54) Anchor Marine Ins. Co. *vs* Corbett, 9 Can. S. C. R. 73.

(55) Lafarge *vs* Liverpool, London & Globe Ins. Co., 17 L. C. J., 237.

(55a) Mason *vs* Andes Ins. Co., 23 U. C. C. P., 37.

"Here the issue is merely whether sufficient proofs had been sent or not. We do not feel disposed to make a new precedent, that the mere omission actively to take some step, or do, or say something to induce a plaintiff to consider his proofs insufficient, is to be evidence of a waiver of the right to receive proper proofs.

We follow the law as laid down in Mulvey *vs* Gore District Mutual Insurance Co., (56) and in Hatton *vs* Beacon Insurance Co. (57)

Plaintiff brought his action on a policy of insurance containing a condition requiring, in the event of loss, a certificate from the two magistrates most contiguous to the place of the fire. No such certificate was produced, and plaintiff relied on a waiver of the condition, the evidence of which consisted of the fact that when the plaintiff's attorney handed to defendant's agent a letter forwarding a certificate from two other magistrates and explaining why a certificate from the two nearest had not been produced, the agent said nothing.

The court held that the silence of defendant's agent, who had on other occasions expressly insisted on a compliance with all the conditions of the policy, was no evidence of waiver. (59)

The mere fact that defendants did not require further preliminary proof, as they might under the policy have done, will not prevent them availing themselves of the objection that there had been false swearing. (60)

One of the conditions of a policy was that all persons assured by the company, and sustaining loss or damage by fire, should give immediate notice of the fire, and proofs of loss within 30 days, and in default thereof should forfeit all claim under the policy. The notice of loss was given, but no proofs of loss within the 30 days, but after the 30 days had expired, the plain-

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(56) 25 U. C. R., 424.

(57) 16 U. C. R., 316.

(59) O'Connor *vs* Commercial Union Ins. Co., 3 R. & C. 119.

(60) Cashman *vs* London & Liverpool Fire Ins. Co., 5 All. 246.

tiff sent in a valuation made by two parties not under oath, and accompanied them with a letter stating that he hoped the proofs enclosed would be satisfactory. He received no reply. A few weeks afterwards he wrote again, asking payment and received a reply that the company was not liable, and declined to pay. On motion for a new trial it was claimed that there had been misdirection on the part of the judge, and that although he had left it to the jury to say whether there had been any waiver of strict compliance with the conditions, yet he had coupled this with a statement that the court could not see any evidence of waiver. As to this, the Privy Council held that there could be no waiver by reason of the company having sent no reply to the plaintiff's letter, as no proofs of loss had been sent by the insured until after the 30 days, and the 30 days was a material part of the condition. The court also said:

"Their Lordships do not mean to say that there may not be a waiver after the 30 days are over. It is possible that if they did anything which misled the assured or put him to expense, there might be a waiver after the time was over, but they are clearly of opinion that not answering this letter after the 30 days cannot of itself be sufficient." (61)

But keeping silent when under an obligation to speak was held to bind the company by estoppel. (62)

RETAINING INSUFFICIENT PROOFS WITHOUT OBJECTION MAY OPERATE AS A WAIVER.

Where the insurer retained the proofs of loss, without objection as to its sufficiency, for more than sixty days before action was taken, the company will be considered to have waived the condition which requires a delay of sixty days after filing claim before the institution of suit; and the fact that a blank in the statement was filled in at the request of the company, within the

(61) Whyte *vs* Western Ins. Co., 7 R. L. 106.

(62) The People's Life Ins. Co. *vs* Tattersall, 37 Can. S. C. R.. 690, infra, p. 239.

period of sixty days before suit, will not affect the right of action.

The condition which requires proof of loss to be furnished within thirty days after the fire may be waived either expressly or impliedly; and the assured is held to be relieved from this condition if the presentation of the claim has been delayed by the company's investigation of the loss, or if the representations of the company's authorized agents have led the assured to understand that compliance with this condition will not be required.

While adjusters of fire losses are not, as a general rule, agents of the companies under an authority sufficient to make their statements binding upon the companies for whom they act, yet an adjuster may become a duly authorized agent of the company by the course of procedure in a particular case, e. g. where the adjuster was the only medium of communication after the fire between the company and the assured, and was engaged by the company to look over the proofs, advise as to a settlement, etc. (63)

AN AGREEMENT AS TO TRIAL MAY OPERATE AS A WAIVER OF WANT OF NOTICE AND PROOFS OF LOSS.

Defendants before the trial agreed that no objection should be taken to the want of a policy, that the question to be tried should be confined to the cause and manner only of the loss, and that all proceedings should be had in the same manner, and to the same effect as if a policy had been duly issued and were produced. Held, that they were precluded from objecting to the want of notice and proof of loss. (64)

AGENT'S CONDUCT IN ACCEPTING DEFECTIVE PROOFS OF LOSS MAY OPERATE AS A WAIVER.

The second plea of the company was that the plaintiff had failed to furnish proofs of his loss to the satisfaction of the com-

(63) Western Ass. Co. *vs* Pharand, Q. R. 11, Q. B. 144.
(64) Walker *vs* Western Ass. Co. 18 U. C. R. 19.

pony *on the printed forms* in use, and in conformity with another condition of the policy, within 30 days from the occurrence of the fire. To this plea the plaintiff answered that he had given such proofs as the nature of the case admitted of, all his books and papers having been destroyed, and that the company received all the information he had to give without raising any objection on that score. The evidence showed that the company's agent, upon receiving the proofs of loss, stated that he had all that was required to lay before the board. As to this the court said:

"The doctrine with respect to furnishing proofs within a stipulated time was enforced in the case of Whyte *vs* The Western Ins. Co." (supra, p. 188) "That doctrine never extended to saying there could be no waiver; but merely applied the stipulation where there was nothing to modify it." (65)

THE STATEMENT OF THE COMPANY THAT IT IS INVESTIGATING THE LOSS MAY OPERATE AS A WAIVER OF NOTICE AND PROOF OF LOSS.

The condition in a policy of insurance against fire, that notice and proof of loss must be given within a stated delay, is not one of liability but of recovery and is imposed in the interest of the insurer. The assured may therefore be relieved from it either expressly, or impliedly, e. g., by the insurer putting him off when applying for a settlement, on the ground that the insurer is himself investigating the circumstances of the loss. The finding of the trial judge in such matters as the representations by the assured as to the value of the property insured and the extent of the loss, will not be interfered with on appeal when the evidence is contradictory. (66)

IN NEW BRUNSWICK IT WAS HELD THE AGENT MIGHT WAIVE CONDITION AS TO PROOFS OF LOSS.

The plaintiff's attorney testified that he met defendants' agent in the street and said he had the proofs ready except the cer-

(65) Kelly *vs* Hochelaga Mutual Fire Ins. Co., 3 L. N. 63.
(66) Mount Royal Ins. Co. *vs* Benoit, Q. R. 15, K. B. 90.

tificate which he feared he could not get in the time required by the policy; the defendants' agent said it made no difference, but to get the proofs as soon as he could. Defendants' agent denied this conversation.

Held, that this was evidence of waiver to go to the jury. (67)

But see McKean *vs* Commercial Union, infra, p. 192.

FURNISHING BLANKS FOR PROOFS OF LOSS AFTER DEFAULT MAY OPERATE AS A WAIVER.

The time limit for furnishing statement of loss is waived by a letter from the company to the insured, dated after the expiration of the delay, and enclosing a blank form of policy in order that the insured might know exactly what it was necessary that he should do. (68)

IN THE FOLLOWING CASES, HOWEVER, IT WAS HELD THAT THE CONDUCT OF THE COMPANY DID NOT OPERATE AS A WAIVER OF THE BREACH OF THE CONDITION RESPECTING PROOFS OF LOSS.

Defendants, among other pleas, traversed the delivery of a statement of loss, verified on oath, within thirty days. It appeared the value of the premises destroyed was the only question after the fire, and to settle that an arbitration was proposed, but did not take place, and the proofs were not sent in till the thirty days had expired. The proposal to refer, however, was apparently after the thirty days, and after plaintiff had received the secretary's letter stating that he could waive nothing. Held that there was no evidence of waiver of the condition on the policy, and a verdict for plaintiff was set aside. (69)

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(67) Crozier *vs* Phœnix Ins. Co., 2 Han. 200.

(68) Western Ass. Co. *vs* Garland, Q. R. 12, K. B. 530.

(69) Niagara District Mutual Fire Ins. Co. *vs* Lewis, 12 U. C. C. P. 123.

A LOCAL AGENT AGREEING TO SEND AN INSPECTOR WAS HELD NOT TO BE A WAIVER OF CONDITION REQUIRING PROOFS OF LOSS.

One of the conditions of the policy required that preliminary proofs of loss should be given, and another condition declared that none of the conditions should be deemed to have been waived by the company unless the waiver was indorsed upon the policy and signed by the agent of the company at St. John.

It was admitted that no preliminary proofs of loss had been given, but the plaintiff relied upon the fact that he gave notice to the local agent at Fredericton who agreed to send a person to examine the premises and make an estimate of the damage; that the local agent did send such an examiner who made an estimate of the amount of damage which was communciated to the assured, who consented to accept it, and also to the local agent who communicated it to the principal agent at St. John, but the latter declined to act upon it. The notice of the refusal was immediately given to the appellant by letter.

Held, King, J., dubitante, that the court below was right in ordering a non-suit to be entered on the ground that there was no evidence of a waiver of the preliminary proof. (70)

DEFECTIVE PROOFS OF LOSS ARE NOT WAIVED BY THE COMPANY'S AGENT AGREEING TO INVESTIGATE THE CLAIM.

Plaintiffs, desirous of being secured for a debt owing to them, were empowered by the debtor to take out a policy of insurance as a security, but at the time the policy issued they had no mortgage or other lien or security upon the debtor's property. The policy on its face was stated to be an indemnity against loss on the stock of goods and merchandise contained in a building owned and occupied by the debtor, and in the application the assured was said to be the mortgagee. The proofs of loss were admittedly defective and the plaintiffs relied on a waiver by reason of

(70) McKean *vs* Commercial Union Ins. Co., 21 N. B. Rep., 583.

certain conversations between them and the defendants' agent whereby the latter said that he would send up a party to investigate and that there would be no delay in payment when the proper papers were made out. Upon the defective papers being received, the agent said that the papers had been sent to England, and nothing would be done till their return.

Held, that there was no evidence of waiver.

On appeal to the Supreme Court of Canada, 11 Can. S. C. R., 92, the judgment below was affirmed on the ground that the plaintiffs had no insurable interest. (71)

ENTERING INTO BONDS OF APPRAISEMENT IS NOT A WAIVER OF PROOFS OF LOSS.

Where the policy contains a condition to the effect that the company shall not be held to have waived any provision or condition of the policy, or any forfeiture thereof, by any requirement, act or proceeding on its part relating to the appraisal, the insured or his representatives is not relieved from the obligation of furnishing proofs of loss as required by the conditions of the policy, by the fact that the company and the insured entered into bonds of appraisement after the fire,—this being a mere conservatory proceeding in the interests of both parties, to establish the amount of the loss at a time most favourable for that purpose. The pretension that the insured and his representatives were unable to furnish such proofs in consequence of the loss of the policies, cannot avail where it is neither alleged nor proved that the policies were lost prior to the fire or within sixty days thereafter—the time within which proofs of loss had to be made. Where a condition of the policy requires that actions based thereon shall be commenced within twelve months from the date of the fire, an action commenced after that date is prescribed. (72)

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(71) Howard *vs* The Lancashire Ins. Co., 5 R. & G., 172.

(72) Prévost *vs* Scottish Union Ins. Co., Q. R., 14 S. C., 208.

DECLINING TO PAY ON ONE GROUND IS NOT A WAIVER OF OTHER OBJECTIONS.

The mere fact that an insurance company makes no objection to the preliminary proof given of a loss, at or after the time of its being received, is no evidence of a waiver by them of objections to it; but where objections are made on other grounds, and no objections taken to the sufficiency of the preliminary proof, it may be evidence of a waiver. (73)

An accident insurance policy provided that in case of death immediate notice must be given in writing addressed to the manager of the company at Montreal, etc., and that failure to give such immediate written notice should invalidate all claims under the policy. The accident happened on the 21st March; the insured died on the 13th April, and notice of the accident and death was only sent to the company on the 29th April, one month and eight days after the accident, and sixteen days after the death. The local agent of the company received written notice of the accident before the death and was verbally informed of the death four days after it took place, and thereupon stated that he would require no further notice and that he had advised the company. The agent also notified the insured's brother that he had notified the company and expected to receive proper papers to be filled out. The beneficiary called on the agent three or four times and was told that the papers had not come, but promising to forward them as soon as they arrived. On the 26th April, the agent wrote to the beneficiary saying that the company had sent some papers but they were not the proper form for death claims, and that he had written again and hoped to send them that week. On the 6th July the manager acknowledged the receipt of the proofs of death and stated that this, together with other documents had been placed under the consideration of the company's medical department. In November the company wrote to the plaintiff's solicitors refusing to pay the claim, basing the refusal on the ground that the death had been due to disease and not to accident.

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(73) McManus *vs* The Ætna Ins. Co., 6 All 314.

The trial judge held that the company had received sufficient notice of death to satisfy the requirements of the policy and that in any event they had expressly waived any objections which they might have urged in this regard, by declining to pay the claim on other grounds.

This judgment was affirmed by the Court of King's Bench but was reversed (Fournier and Patterson, JJ., dissenting) by the Supreme Court on the ground that the company had not received sufficient notice of the death to satisfy the requirements of the policy, and that by declining to pay the claim on other grounds there had been no waiver of any objection which they had a right to urge in this regard. (74)

A company declining to pay a claim in consequence of non-disclosure of material facts in the application for insurance, is not a waiver which can be invoked to dispense with the insured complying with the conditions of the policy that he must furnish proofs of loss within 30 days. (75)

But in Quebec it was held that where an insurance company had, by resolution of its board, nearly three months after a fire, objected to a claim, without referring to the delay in filing, that they had waived the right to set up that as a plea. (76)

Breach of the obligation on the part of the insured, who is not the owner of the property insured, to declare his interest therein, even where it constitutes a warranty in or condition of the policy, does not give rise to an absolute nullity but only to a relative nullity, which can be invoked by the insurer alone. The latter is presumed to have waived it where having knowledge of this ground of nullity, he does not avail himself of it but acknowledges the obligation arising from the policy. (77)

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(74) Accident Ins. Co. of North America *vs* Young, 20 Can. S. C. R., 280.

(75) Mulvey *vs* Gore District Mutual Ins. Co., 25 U. C. R. 424.

(76) Duharme *vs* Mutual Ins. Co., of Laval, Chambly and Jacques Cartier, 2 L. N., 115.

(77) St. Amand *vs* Cie d'Assurance de Québec, 9 Q. L. R., 162.

A condition was, "Persons sustaining loss or damage shall forthwith give notice of such loss to the company, and within 15 days thereafter render a particular account of such loss, etc., and until such proofs, declarations and certificates are produced and examinations and appraisals permitted by the claimant the loss shall not be payable, nor shall any act of the company, except their written declaration, operate to waive the requirements of such proofs."

Held, that the correspondence between the assured and the company after the expiration of the 15th days allowed by the policy for furnishing preliminary proofs and refusing to pay, not upon any defects in the proofs furnished, but upon another ground, was evidence of waiver. (78)

WHERE THE COMPANY ABSOLUTELY REPUDIATES LIABILITY, THIS IS A WAIVER OF ALL CONDITIONS REQUIRING PRELIMINARY PROOFS OF LOSS OR OTHER CONDITIONS PRECEDENT TO ACTION.

When a company absolutely repudiates the insurance effected by the deposit receipt, and when the policy has not issued, the right of action accrues at once, and there is no necessity of giving the preliminary notices and conforming to the delay and other conditions precedent in case of loss endorsed upon the company's policies. (79)

Une compagnie d'assurance veut se prévaloir de ce que l'assuré n'a pas donné avis de l'incendie dans les délais requis par la police:—Jugé:—Que, si, lorsqu'elle a refusé de payer, la compagnie n'a pas objecté aux informalités contenues dans l'avis, cela constitue une renonciation (*waiver*) de sa part à son droit d'obtenir un avis dans une autre forme ou plus circonstancié. (80)

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(78) Bowes *vs* National Ins. Co., 20 N. B. Rep., 438.

(79) Goodwin *vs* Lancashire Fire and Life Ins. Co., 18 L. C., 1; 16 L. C. J., 298.

(80) Garceau *vs* Niagara Mutual Ins. Co., 3 Q. L. R., 337.

A condition of the policy, requiring notice of loss to be given, and a particular statement thereof to be delivered by the insured within fifteen days after the fire, may be waived and dispensed with by a distinct denial of liability, and refusal to pay, on the part of the company. (81)

In its *considérants,* the Court said:

" Considérants que la dite défenderesse, lors de l'institution de la présente action, avait refusé et refusait de payer à la dite demanderesse le montant de la police d'assurance en partie récitée en la déclaration en cette clause, et que la dite demanderesse était en droit de prendre son action avant l'expiration des quatre-vingt-dix jours accordés à la dite défenderesse pour effectuer le paiement de la somme réclamée en cette cause." (82)

A policy of fire insurance issued by the defendant company contained a provision that "in the event of disagreement as to the amount of loss, the same shall, as above provided, be ascertained by two competent appraisers", etc. Held, per Graham, E. J., McDonald, C. J. and Ritchie, J., concurring, that the company having repudiated all liability in respect of the claim, they most distinctly averred that there was no disagreement as to the mere amount of the loss, and, therefore, no appraisal would be required, and that the assured, having asked for an appraisal, and having named two disinterested appraisers, was discharged from the performance of the condition by the company's refusal. (83)

The contrary was held in an early case in Ontario.

A declaration by the insurance company that they intend to resist payment, cannot be construed as a waiver of the condition of the policy which provides that the company are not liable until 60 days have expired after all proofs, declarations and certificates have been given. (84)

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(81) Herald Co. *vs* Northern Ass'ce Co., 12 L. N., 30.

(82) Citizens Ins. Co. *vs* Boisvert, 14 R. L., 156.

(83) Margeson *vs* Guardian Fire and Life Ass. Co., 31 N. S. Rep., 359.

(84) Hatton *vs* Provincial Ins. Co., 7 U. C. C. P., 555.

But more recently the company was held liable on the ground of estoppel. (Morrow *vs* Lancashire, infra, p. 228.)

The following decision to the contrary effect by the Supreme Court is not satisfactory as the point, according to the report, only arose on the settlement of the minutes and is not discussed in the reasons for jugment.

This was a case arising after the Fire Insurance Policy Act, but when the Ontario Courts had held this act did not apply to Mutual Companies.

A mutual insurance company, issued in favour of J. F. a policy of insurance, insuring him against loss by fire on a general stock of goods in a country store, and under the terms of the policy the losses were only to be paid within three months, after due notice given by the insured, according to the provisions of 36 Vict., ch. 44, sec. 52 (O), R. S. O., 1877, ch. 161, sec. 56, which provides that, in case of loss or damage the member shall give notice to the secretary forthwith, and the proofs, declarations, evidences, and examination called for by or under the policy must be furnished to the company within thirty days after said loss, and upon receipt of notice and proof of claim as aforesaid the board of directors shall ascertain and determine the amount of such loss or damage, and such amount shall be payable in three months after receipt by the company of such proofs. A fire occurred on the 21st May, 1877. On the next morning J. F. advised the insurance company by telegraph. On the 29th June, 1877, the secretary of the company wrote to J. F.'s attorneys, that if he had any claim he had better send in the papers, so that they might be submitted to the board. On the 3rd July, 1877, J. F. furnished the company with the claim papers, or proofs of loss, and on the 13th July he was advised that, after an examination of the papers at the board meeting, it was resolved that the claim should not be paid. On the 23rd August, 1877, J. F. brought this action upon the policy. The appellants pleaded *inter alia* that the policy was made and issued subject to a condition that the loss should not be payable until three months after the receipt by the defendants of the proofs of such

loss, to be furnished by the plaintiff to the defendants; and averred the delivery of the proofs on the 3rd July, 1877, and that less than three months elapsed before the commencement of this suit. Held, reversing 43 U. C. R., 102, and 4, A. R. 293, that the appellant company under the policy in this case were entitled to three months from the date of the furnishing of claim papers before being subject to an action, and that therefore respondent's action had been prematurely brought. (85)

THE RECENT DECISIONS OF THE SUPREME COURT OF CANADA HAVE HELD THE INSURED TO A RIGID OBSERVANCE OF THE CONDITIONS WITH RESPECT TO PROOFS OF LOSS.

One Jarvis, who was a fire insurance agent and also adjuster, deposed that he was not an officer of the defendant company, but went at the request of the company to adjust the loss, and said that he had nothing to do with receiving notice of loss or putting in the proofs, and that he did not represent himself to the plaintiff as having any such authority. The plaintiff deposed that Jarvis had told him he had 30 days in which to deliver proofs of loss, whereas the condition of the policy required the proofs to be in within 15 days. All of this was denied by Jarvis.

The material conditions of the policy were the following:

"2 Any person entitled to make a claim under this policy is to observe the following directions:

"(a) He is forthwith after loss to give notice thereof in writing to the company; and

"(b) He is to deliver within 15 days after the fire in writing as particular an account of the loss as the nature of the case permits.

"6. No condition of the policy, either in whole or in part, shall be deemed to have been waived by the company unless the waiver is clearly expressed in writing signed by the company's manager in Montreal."

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(85) Mutual Fire Ins. Co. of the County of Wellington *vs* Frey, 5 Can. S. C. R., 82.

There was no provision that non-compliance with condition 2 should void the policy or any claim thereunder.

And the main question pon the appeal was as to whether the condition was waived by the company so as to enable the plaintiff to recover. The judgment of the Court was delivered by Sedgewick, J., who said:

"I am of opinion that whatever Jarvis's authority may have been, and whether under given circumstances he might not have had power to extend the time within which the proofs of loss might be given notwithstanding the fifteen days condition in the policy, yet inasmuch as fifteen days after the fire the policy had become absolutely forfeited by reason of failure of delivery of the proofs nothing that Jarvis could thereafter do without the express authority of the company could reinstate it and revive the company's liability upon it.

"I am further of opinion that the evidence does not disclose any facts from which it can be inferred that the company waived the condition. At the time of the conversation relied on twenty-seven days after the fire the policy as I have said had already been forfeited. Nothing within those twenty-seven days that Jarvis had said or done could have induced the plaintiff to alter his position in any way, nor so far as I can see was his position altered in consequence of what he says Jarvis told him, nor does he even allege that his position was in any way changed." (86)

Certain conditions of a policy of fire insurance required proofs, etc., within *fourteen days* after the loss, and provided that no claim should be payable for a specified time after the loss should have been ascertained and proved in accordance with this condition. There were two subsequent clauses providing respectively that *until* such proofs were produced, no money should be payable by the insurer and for forfeiture of all rights of the insured if the claim should not, for the space of *three months* after the occurrence of the fire, be in all respects verified in the manner aforesaid.

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(86) Atlas Assur. Co. *vs* Brownell, 29 Can. S. C. R., 537.

The plaintiff failed to comply with the above condition as to proofs of loss and claimed waiver, and in support thereof said that after the fire he had a conversation with the local agent of the company as to what was to be done and that the latter said to keep quiet until the adjusters arrived; that nothing could be done until they arrived. The adjuster arrived three days after the loss and set about getting the articles sorted out so as to expedite the work of appraisal, and before leaving the next day delivered the following letter to the plaintiff:

"In confirmation of my verbal instructions of this morning, I require you to conform to the conditions printed in your policy with the Commercial Union Assurance Co. When your stock is ready for appraisement please notify Mr. Roscoe, agent here at Kentville."—Sgd. Butcher.

Mr. Justice King says:

"The plaintiff says that after receiving this letter he looked over the conditions of the policy, and that sometime during the week following the fire (which occurred on Monday) he consulted a Mr. Shaffner about making out proofs of loss; and he further says:

'It was about the time I got Butcher's letter that I wen to Shaffner. I could not say whether it was before or after. I did not take the policy to him. I read the conditions all over at that time. I knew very little about proofs of loss before reading them. I knew that they were required. I had a slight idea of that from the first. I always supposed I would have to prove the loss. I had a discussion with the adjusters about the appraisement, not about the proof, on their first visit.'

"The following question (amongst others) was left to the jury:

'Did the acts and words of the local agent and adjuster of the defendant company before the adjusters left Kentville the first time, reasonably cause the failure of plaintiff to deliver proofs of loss before March 31, 1897? If so, state in detail what were such acts and words.'

"And the jury answered:

'Yes. The local agent informed plaintiff to keep quiet until adjuster arrived, that nothing could be done until then. That plaintiff was told by Butcher that he would make up proofs of loss on his return.'

"Assuming that Butcher's letter of 26th February primarily referred to the assorting of the goods, it contains a clear intimation to the insured that he is to look to his contract and comply with its conditions. And that he so understood it himself is clear, for he thereupon read the conditions all over and appears to have consulted a Mr. Shaffner about making out proofs of loss. It is idle, therefore, for the plaintiff to say that the reason he did not make out the proofs of loss was because he thought that Butcher had come for the purpose of helping to make out such proofs (supposing that this is a sufficient reason). Again, and as an alternative answer to the question of his counsel as to why he did not make out the proofs of loss, he says:

'I did not do so because they (i. e. Butcher and one Jarvis, the adjuster for another company) had a list of the goods and I thought the proofs of loss could be made up from the appraisement they were making.'

"This, (if it amounts to anything) clearly relates to a time after the expiration of the fourteen days prescribed for furnishing the particular statement or account. It consequently appears that there was no substantial evidence upon which the jury could reasonably find as they did upon this question, and the plaintiff is in the position of having omitted to comply with a condition precedent to his right of recovery The implied authority of a person acting in Mr. Butcher's capacity was considered under somewhat similar circumstances in Atlas Ins. Co. *vs* Brownell (29 Can. S. C. R. 537) decided this term.

"Were the evidence much stronger than it is, the plaintiff under the circumstances of this case, would find himself precluded from availing himself of any waiver on the part of Mr. Butcher by the full and explicit provisions of the 19th condition stipulating that:

"'No one of the foregoing conditions or stipulations, either in whole or in part, shall be deemed to have been waived by or on behalf of the company unless the waiver be clearly expressed in writing by indorsement upon this policy signed by the agent of the company at Halifax, N. S.'" (87)

A condition in a policy of insurance against accidents required that in the event of an accident thereunder, written notice containing the full name and address of the insured with full particulars of the accident, should be given within 30 days of its occurrence to the manager for the United States, or the local agent. The defendant pleaded among other defences that no notice was given as required by this condition. To this plea the plaintiff demurred and her demurrer was sustained by the Supreme Court of New Brunswick, which held that the giving of the notice was not a condition precedent to a right of action on the policy. From that judgment an appeal was taken to the Supreme Court of Canada. Taschereau, J., who delivered the judgment of the majority of the court, says:

"The point of law upon this appeal is therefore, whether the above provision is a condition precedent to any right of action upon this policy, or an independent and collateral covenant, I think it is a condition precedent.

"That provision cannot be read out of the contract. It forms part of it, and is a stipulation that must be given effect to. Now, to say that it is not a condition precedent is to leave it without any effect whatsoever. The intention of the parties, which is the guide in interpretation of contracts, must necessarily have been that this notice should be a condition precedent to any right of action upon the policy. Otherwise, the stipulation is vain, frivolous, means nothing. It was not necessary to say that it was to be a condition precedent. It is so by its nature. It is not a condition at all if it is not a condition precedent. And we cannot so obliterate it from the contract. I would allow the appeal with costs." (88)

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(87) Commercial Union Ass. Co. *vs* Margeson, 29 Can. S. C. R., 601.

(88) Employers' Liability *vs* Taylor, 29 Can. S. C. R. 104.

The 10th condition of a policy provided that on the happening of any loss or damage by fire, the insured shall forthwith give notice thereof in writing to the company, or its resident secretary at its head office, or at the office of the company's local agent through whom the insurance was effected, and within 15 days at the latest after the fire, deliver to the company, its secretary or agent, as accurate and particular an account of his loss and damage, *supported by vouchers,* as the nature and circumstances of the case will admit of.

Held, that this condition must be read with art. 2478, and reading the two together, the effect was held to be that the assured must conform to the conditions and delays prescribed in the policy unless it be impossible or be dispensed with by the insurer formally or impliedly, and a verbal notice to the local agent given the next day after the fire, who transmitted it at once in writing to the head office, asking to have an adjuster sent at once to inspect the loss, was a waiver of the condition.

Held, further, that the adjuster having requested the insured before filling out his claim paper to procure duplicate invoices, the originals having been burned, which necessitated a delay beyond the 15th days prescribed, this condition was also waived. (89)

This case was relied on and followed by the Court of Queen's Bench in the next following case, but its decision was reversed by the Supreme Court.

A policy of insurance contained the usual conditions which required the insured should make proofs of loss within 14 days; that the loss should not be payable until 60 days after the proofs were furnished, and that the company should not be deemed to have waived any condition or forfeiture by any requirement, act or proceeding on its part relating to the appraisal or to any examination required by the conditions. Proofs were not made as provided by the condition, and insured pleaded waiver by the company, on the grounds, first, that the adjusters of two other

(89) Liverpool, London & Globe Ins. Co. *vs* Valentine, Q. R. 7 Q. B. 400.

companies had reported to the insurers respecting an adjustment of the loss on the basis of their inspection; 2ly., that a director of the company and a member of the liquidating committee (the insurance company having become insolvent), had recognized this claim and promised to pay, although there was no proof that they were authorized to do so; and 3ly., that the manager of the company after voluntary liquidation had sent a circular to the company's creditors in which he included this claim amongst the liabilities of the company. The manager denied having authority from the Board of directors or the liquidating committee to send the circular. It was held that none of these acts constituted a waiver and that the liquidating committee, which was simply a body appointed by the directors, and who had never been approved by the creditors, had no legal authority to bind the company. (90)

THE PRODUCTION OF A CERTIFICATE FROM TWO MAGISTRATES CONTIGUOUS TO THE PLACE OF FIRE, BUT NOT THE MOST CONTIGUOUS AS REQUIRED BY THE CONDITION, WAS HELD TO VOID THE POLICY.

A policy of insurance against fire contained the following conditions:—

"The assured must procure a certificate under the hands of two magistrates most contiguous to the place of fire, and not concerned or directly or indirectly interested in the loss or assurance as creditors or otherwise, or related to the assured or sufferers, that they are acquainted with the character and circumstances of the assured, and have made diligent inquiry into the facts set forth in the statement and account of the assured, and know, or verily believe, that the assured really, by misfortune, and without fraud or evil practice, hath or have sustained by such fire loss or damage to the amount therein mentioned.

"No one of the foregoing conditions or stipulations, either in

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(90) Hyde *vs* Lefalvre, 32 Can. S. C. R., 474.

whole or in part, shall be deemed to have been waived by or on the part of the company, unless the waiver be clearly expressed in writing by indorsement upon this policy, signed by the agents of the company at Halifax, N. S."

The insured's premises having been destroyed by fire he applied to two magistrates contiguous to the place of the fire for the required certificate, which they refused, and he finally obtained such certificate from two magistrates residing at a distance from such place. The proofs of loss, accompanied by the certificate, were sent to the agent, who subsequently made an offer of payment to compromise the claim, stating that if such offer was not accepted the claim would be contested. The agent, on a subsequent occasion, told the assured that he objected to the claim, as he "did not think it was a square loss."

Held, affirming the judgment of the court below, that the non-production of the certificate, required by the above condition, prevented the assured from recovering on the policy.

Held, also, that even if such condition could be waived without indorsement on the policy, the acts of the agent did not amount to a waiver.

Semble, that the condition could not be so waived.

The plaintiff at the trial deposed that at an interview with one Crowe, the local agent of the company at Truro, and a subordinate to Salter who was the general agent at Halifax, the following conversation took place:

"I said he must not delay me, as I had to get a certificate from the two J. P.'s nearest the fire. He said that was of no consequence, as any two responsible J. P.'s would do."

And he also swore that:

Having gone twice to Halifax to see Salter, the agent of respondents there, who granted and signed the policy on the second occasion and when Salter had had in his hands for some time the papers furnished by the appellant as proofs of loss, the following conversation took place:

"I said to Salter, 'How are things progressing in my case'? He replied: 'Your papers and everything are quite satisfactory.

There are one or two cases ahead of yours, and when they are settled yours will be' ".

This conversation was denied by Salter. who says in his evidence:

" I did not tell him his papers were right."

As to this Strong, J., says: "I am of opinion that, irrespective altogether of the requirement of the 19th condition requiring that any waiver should be in writing, there was no evidence showing that the stipulations as to the magistrate's certificate required by the 14th condition had been, in fact, waived in such a way as to bind the respondents, even if a verbal waiver had not been provided against. Salter, as agent, apart from the authority expressly conferred on him to waive in writing, had no power so to bind the respondents, and granting that the plaintiff's account of what passed at the interview at Halifax was, as the jury found, the true one, what was then said could not in any way have precluded the company from setting up the want of the certificate as a defence, simply for the reason given that Salter was exceeding his powers in assuming (even if the plaintiff's evidence is to be so construed) to dispense with it. Further, even if there could have been any doubt of this in the absence of the 19th condition, that condition clearly excludes any authority in the agent to waive otherwise than according to its terms. Lastly, there was not the slightest evidence of any waiver of the 19th condition itself, and moreover it is manifest that nothing Salter, the agent, might have said, could have had the effect of enlarging the limited powers to waive which the company had thought fit to impose upon him. The appeal is therefore totally unfounded, and should be dismissed with costs."(91)

A policy of insurance contained a condition requiring the assured, in case of loss, to procure a certificate as to the matters contained in the statement of loss under the hands of two magistrates most contiguous to the place of the fire. A further condition provided that no condition should be deemed to have been waived unless the waiver was expressed in writing indorsed on the policy.

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(91) Logan *vs* Commercial Union Ins. Co., 13 Can. S. C. R., 270.

Held, per Tuck, C. J., Hanington, Barker and Gregory, JJ., that the production of the certificate of the magistrates most contiguous to the place of fire was a condition precedent to the assured's right to recover. Per Landry and McLeod, JJ., that the magistrate most contiguous qualified to act is the most contiguous within the meaning of the condition, though not the nearest in point of distance to the place of the fire. Per curiam, that if there could be a waiver under the condition, without indorsement on the policy, the acceptance of the proof of loss by the company, without objection, was not a waiver. (92)

WAIVER MUST BE PLEADED.

Under the Ontario Judicature Act the performance of conditions precedent to a right of action must still be alleged and proved by the plaintiff. (93)

LEGISLATION RELIEVING INSURED.

Legislation relieving the insured where there has not been a strict compliance with the conditions respecting proofs of loss, will be found, as respects Ontario, infra, p. 441, as respects Quebec, infra, p. 440, as respects Nova Scotia, infra p. 442, Manitoba infra, p. 442, Alberta and Saskatchewan, infra, p. 442, and British Columbia, infra, p. 442.

Waiver of proofs of loss, as it affects mortgages. *Vide* Bull *vs* North British Ins. Co., supra, p. 109.

Estoppel. — The liability of the principal for the conduct and representations of his agent, where there is no express authority conferred, but the acts are within the scope of his ostensible authority, has been rested by Mr. Ewart upon the doctrine of estoppel(94). Although controverted by some leading American writers, this view for the first time affords a logical and scientific basis for the doctrine of Implied Agency, and its application in insurance cases will be elaborated in the next succeeding chapter which deals with Agency.

(92) LeBlanc *vs* Commercial Union Ins. Co., 35 N. B. Rep., 665.
(93) Home Life Association *vs* Randall, 30 Can. S. C. R., 97.
(94) Ewart, on Estoppel, p. 486.

CHAPTER VI

AGENCY.

Estoppel by misrepresentation of agent. — Doctrine of the English and civil law. — Agency in insurance cases. — Officials at head office. — General agents. — Local general agents. — Local agents. — Powers with respect to interim receipt. — Powers after issue of policy and before loss. — Powers after loss. — Sub-agents. — Brokers. — Adjusters. — Inspectors. — Application. — Interim receipt.

Estoppel by misrepresentation.

Estoppel of this character, which by some writers is called estoppel by conduct, is a subdivision of estoppel *in pais* (estoppel in the country) as defined by Lord Coke. (1)

As pointed out by Mr. Ewart, (2) the phrase "estoppel *in pais*" is of value in marking off estoppel by record and estoppel by deed from all the heterogeneous cases which are not these. It was never intended to cover cases of estoppel by misrepresentation; and such cases have only been assigned to it because they were less allied to either of the other two categories.

We have already given the definition of estoppel by misrepresentation in Pickard *vs* Sears and Freeman *vs* Cooke, supra, p.

(1) Coke, on Litt. 352a.

(2) Ewart, on Estoppel, p. 1.

127, to which may be added the later definition of Brett, L. J., in Carr *vs* London & North Western Ry. Co., (3) as follows:

1st. "If a man, either in express terms or by conduct, makes a representation to another of the existence of a certain state of facts which he intends to be acted upon in a certain way, and it be acted upon in that way, in the belief of the existence of such a state of facts, to the damage of him who so believes and acts, the first is estopped from denying the existence of such a state of facts."

2nd. "If a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that the latter was intended to act upon it in a particular way, and he with such belief does act in that way to his damage, the first is estopped from denying that the facts were as represented"...

ESTOPPEL BY MISREPRESENTATION OF AGENT.

Insurance companies, like all other incorporated bodies, *ex necessitate rei,* can carry on business only by means of officials to whom certain functions are delegated by the act of incorporation. These officials are nevertheless only the agents of the Company, however plenary their authority may be, and when they exceed their powers the company will not be bound by their acts, except the circumstances entitle a person dealing with the company through them to relief on the ground of estoppel.

In addition to these officials the company employs agents with more or less extensive powers, and it is with respect to the extent of the powers of such agents that the application of the doctrine of estoppel by misrepresentation in insurance cases most frequently arises.

In the first place, therefore, it is desirable to consider shortly the general law of agency, and then the special application of this law to insurance contracts.

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(3) L. R., 10 C. P., 307.

Agency.

In considering the nature and extent of the authority which may be delegated to an agent, Story says: "Agency is commonly divided into two parts: 1ly., a special agency; 2ly., a general agency. A special agency properly exists, when there is a delegation of authority to do a single act; a general agency properly exists where there is a delegation to do all acts connected with a particular trade, business, or employment.

"Thus, a person who is authorized by his principal to execute a particular deed, or to sign a particular contract, or to purchase a particular parcel of merchandise, is a special agent. But a person, who is authorized by his principal to execute all deeds, sign all contracts, or purchase all goods required in a particular trade, business or employment, is a general agent in that trade, business or employment.

"A person is sometimes (although perhaps not with entire accuracy) called a general agent, who is not appointed with powers so general, as those above mentioned; but who has a general authority in regard to a particular object or thing; as, for example, to buy and sell a particular parcel of goods, or to negotiate a particular note or bill; his agency not being limited in the buying or selling such goods, or negotiating such note or bill, to any particular mode of doing it. So an agent, who is appointed to do a particular thing in a prescribed mode, is often called a special agent as contradistinguished from a general agent.

"On the other hand (although this is not the ordinary commercial sense), a person is sometimes said to be a special agent, whose authority, although it extends to do acts generally in particular business or employment, is yet qualified and restrained by limitations, conditions, and instructions of a special nature. In such a case the agent is deemed, as to persons dealing with him in ignorance of such special limitations, conditions and instructions, to be a general agent; although, as between himself and his principal, he may be deemed a special agent. In short, the true distinction (as generally recognized) between a

general and a special agent (or, as he is sometimes called, a particular agent), is this: a general agency does not import an unqualified authority, but that which is derived from a multitude of instances, or in the general course of an employment or business; whereas a special agency is confined to an individual transaction."

AGENCY IN QUEBEC.

The doctrine of the civil law which prevails in the Province of Quebec on this subject is defined in certain articles of the Civil Code. Here the contract of agency is called a mandate, the principal is called the mandator, and the agent the mandatary. Art. 1701 is as follows:

"Mandate is a contract by which a person, called the mandator, commits a lawful business to the management of another, called the mandatary, who by his acceptance obliges himself to perform it.

"The acceptance may be implied from the acts of the mandatary, and in some cases from his silence."

Art. 1703 reads in part as follows:

"The mandate may be either special, for a particular business, or general, for all the affairs of the mandator."

This portion of the article is taken from the Code Napoleon, art. 1987, which reads as follows:

"Le mandat est ou spécial et pour une affaire ou certaines affaires seulement, ou général et pour toutes les affaires du mandant."

Under the civil law therefore we have the same division of agents into general and special, as we find recognized under the English jurisprudence. Baudry-Lacantinerie, art. 514, says:

"Au point de vue de son étendue le mandat peut être général ou spécial. *'Il est ou spécial et pour une affaire ou certaines affaires seulement, ou général et pour toutes les affaires du mandant'*, dit l'art. 1987."

Art. 1704 reads: "The mandatary can do nothing beyond the authority given or implied by the mandate. He may do all acts which are incidental to such authority and necessary for the execution of the mandate."

This article of the Code is stated by the codifiers as being based upon art. 1989 of the Code Napoleon, and the authority of Domat and Troplong. Only the first part of the article is taken from the French Code, the latter part is based upon the authorities of the jurisconsults, particularly the following article of Troplong, *Du Mandat*:

319. "Il reste à faire observer que ce n'est pas aller au delà de la procuration que de faire certains actes qui, quoique non exprimés, y sont cependant virtuellement compris comme conséquents, antécédents et compléments. On suppose que le mandant n'a pas parlé de ces actes parce qu'il l'a jugé inutile, ou bien parce qu'il n'y a pas pensé; car, s'il y eût pensé, il en eût imposé le devoir au mandataire. C'est ce qu'enseigne le président Favre sur la loi 30 D., *Mandati*: *'Intelliguntur ea omnia quae credibile sit mandatorem in mandato expressum fuisse, si de iis cogitasset.'* "

Art. 1705 reads: "Powers granted to persons of a certain profession or calling to do anything in the ordinary course of the business which they follow, need not be specified; they are inferred from the nature of such profession or calling."

This section, according to the codifiers, is based upon Story on Agency, par. 127 et seq., Paley, on Agency, and the Louisiana Code, art. 2969, which reads as follows:

"Powers granted to persons who exercise a profession, or fulfil certain functions, of doing any business in the ordinary course of affairs to which they are devoted, need not be specified, but are inferred from the functions which these mandataries exercise."

Story says: (par. 127): "If a person is held out to third persons, or to the public at large, by the principal, as having a general authority to act for and to bind him in a particular business

or employment, it would be the height of injustice, and lead to the grossest frauds, to allow him to set up his own secret and private instructions to the agent, limiting that authority; and thus to defeat his acts and transactions under the agency, when the party dealing with him had, and could have, no notice of such instructions. In such cases, good faith requires that the principal should be held bound by the acts of the agent, within the scope of his general authority; for he has held him out to the public as competent to do the acts, and to bind him thereby."

And cites in support of the proposition, the following from Pothier on Obligations:

"But the contract made by my agent, in my name, would be obligatory upon me, if he did not exceed the power with which he was ostensibly invested; and I could not avail myself of having given him any secret instructions, which he had not pursued. His deviation from these instructions might give me a right of action against himself, but could not exonerate me in respect of the third person, with whom he had contracted conformably to his apparent authority; otherwise no one could be safe in contracting with the agent of an absent person."

The more recent text writers in France are to the same effect.

Baudry-Lacantinerie, on the subject *Des Contrats du Mandat,* art. 780, says:

"Par exception le mandant est tenu des actes excédant les pouvoirs du mandataire si les tiers ont pu et dû croire que ces actes rentraient dans les pouvoirs du mandataire. Dans ce cas le mandant a commis une faute en n'éclairant pas suffisamment les tiers sur la portée du mandat.....

"Enfin, les tiers ne sont pas coupables de ne pas avoir vérifié les termes du mandat si la nature des fonctions du mandataire entraîne par elle-même certains pouvoirs, en un mot, si le mandant a fourni aux tiers des raisons de croire à un mandat plus étendu que le mandat véritable."

And also, Guillouard, *Traité des Contrats aléatoires et du Mandat,* art. 186, says:

"Mais, vis-à-vis des tiers, il importe peu que le mandataire ait réellement excédé ses pouvoirs, si, *en apparence,* il a semblé s'y conformer. Les tiers de bonne foi qui traitent avec le mandataire ne peuvent juger de l'étendue des pouvoirs de celui-ci que par l'apparence de son mandat, et si, grâce à la forme de ce mandat, le mandataire peut excéder ses pouvoirs sans que les tiers s'en aperçoivent, le mandant n'en est pas moins obligé, comme si l'acte rentrait dans les pouvoirs qu'il a donnés. Il doit en effet s'imputer de n'avoir pas mieux veillé à ce que l'ordre par lui donné ne fût pas dépassé."

Art. 1709 reads: "The mandatary is obliged to execute the mandate which he has accepted, and he is liable for damages resulting from his non-execution of it while his authority continues."

Art. 1710 reads: "The mandatary is bound to exercise, in the execution of the mandate, reasonable skill and all the care of a prudent administrator."

It would appear clear, therefore, that by virtue of these articles of the Code, the general principles of estoppel by conduct of the agent are as well recognized under the civil law as in the English jurisprudence, and that an insurance company is bound by the acts of its agent within the scope of his ostensible or apparent authority in contracts made in the Province of Quebec to the same extent, and in the same manner, as under the English law which prevails in the other Provinces of Canada, and that the cases hereinafter cited from the Province of Ontario, turning upon the doctrine of estoppel, are applicable in cases arising under the Civil Code in the Province of Quebec.

Agency in insurance cases.

The general principles which govern the relation between principal and agent in other transactions are applicable to fire insurance contracts.

The difficulty in applying general principles arises from the employment of agents whose duties and powers differ so widely in their scope. It is not always easy to determine whether under

the facts of a particular case, the agent's authority is general or special. It becomes necessary in the first place to differentiate the insurance agents into classes.

1. Officials at the head office of the company.

2. General agents.

This term is usually, and more properly, applied to the Canadian representatives of foreign companies.

3. Local general agents.

In addition, however, to general agents properly so called, there are general agents who superintend the company's business for large districts, sometimes an entire province being under their control, at other times, a city and adjoining territory. Such agents, although special in that their powers are limited by instructions of a special nature as between themselves and their principals, yet, they have so general an authority in regard to the insurance business entrusted to them that with respect to persons dealing with them in ignorance of such special limitations, they are treated as general agents. As this constitutes a very large and important class, they are hereafter, for convenience, designated *local general agents.*

4. Local agents.

Local agents may be defined as representatives of the company having authority to solicit applications for insurance and to bind the company for short term contracts of insurance extending over usually 30 or 40 days, and being entrusted by the company for the purpose with forms of application and printed forms of interim contracts or receipts, as they are styled. These interim receipts have the name of the manager or general agent stamped or lithographed thereon. They recite the application for insurance and declare that, pending the acceptance or refusal of the proposal, the property is held insured by the company for a prescribed period.

5. Sub-agents.

A sub-agent is an agent to secure applications for the company and forward them to his principal, the company's agent. In the Province of Nova Scotia the expression "sub-agent" is used with the significance of local agent.

6. Brokers.

A broker properly speaking, is a mere negotiator between the party wanting insurance and the company. He never acts in his own name, but in the name of those who employ him.

Broker is thus defined by the Civil Code, Art. 1735:

"A broker is one who exercises the trade and calling of negotiating between parties the business of buying and selling or any other lawful transactions.

"He may be the mandatary of both parties and bind both by his acts in the business for which he is engaged by them."

7. Adjusters.

An adjuster may be defined as an agent of the company empowered to ascertain and fix the amount of its loss upon the property insured. With some companies the adjuster is called *inspector*.

POWERS OF AGENTS OF THE COMPANY.

1. Officials at Head Office of the company.

We have now to consider to what extent there is any limitation upon the general manager or officials having control at the head office to deal with the contract of insurance in any manner they deem fit.

Although even the general manager cannot by estoppel bind the company to a contract beyond its corporate powers, yet, as the company can only transact business through its directors and officers at the head office, these powers are only limited by the powers of the company itself.

An early Canadian case dealing with this question is Montreal Assce. Co. *vs* McGillivray. (4) The facts of this case are set out in the judgment of the Judicial Committee delivered by Sir John Coleridge, as follows:

"The facts appeared to be, in substance, these:—Hays, acting by the authority of the respondent, having agreed to effect an insurance for her in her name, repaired to the office of the appellants, on or about the 18th of February, where he saw Murray, who then was, and had been from its formation, the manager of the company; he applied to him in the usual way to effect the insurance, stating for whom it was to be; and all was proceeding in the usual way in which policies were effected, without difficulty, until it appeared that he was not prepared to pay down the premium, in lieu of which he offered his own promissory note, payable on the 1st of March following. This was at first refused, as contrary to the course of the office, and to Murray's instructions, but finally accepted, and the particulars of the intended policy entered in the policy order book in the usual way. The policy was to be sent when made out, but it never was made out. The note was not paid at maturity, but dishonoured and protested; the premium was never paid, and a few days after the maturity of the note, and long before the fire, the entry in the order book was crossed out by the directions of Murray.

"Upon these facts the appellants contended, that they had no power to effect such an insurance without a policy, as the respondent was compelled to rely on, and that if they could, they had never constituted Murray their agent for the effecting of such an assurance, and, consequently, that if such an insurance was in fact made by him, he had acted without their authority, and they were not bound by his acts. The learned judge, in his summing up, disposes of the first point, as a matter of law, in favour of the respondent, and then, considering only the nature of the acts done by Murray, assumes that in doing them he was the agent of the appellants."

(4) 13 Moo. P. C., 87.

He says: "Their Lordships do not think it necessary to express any opinion on the first point; they will assume for the purpose of their decision, that the learned judge was right in his view of the law; nor do they deem it essential or intend to state whether, in their judgment, Hays was a competent witness. They assume for the present purpose in favour of the respondent that he was so. With this remark they proceed to consider the facts on which the learned judge's direction turns as evidence bearing on the second point; the question of agency, in fact. And upon this they think, the true question for the jury to have been, not what was the real extent of authority expressly or in fact given by the appellants to Murray, but what the appellants held him out to the world, to persons with whom they had dealings, and who had no notice of any limitation of his powers, as authorized to do for them. For it cannot be doubted, that an agent may bind his principal by acts done within the scope of his general and ostensible authority, although those acts may exceed his actual authority as between himself and his principal; the private instructions which limit that authority, and the circumstance that his acts are in excess of it, being unknown to the person with whom he is dealing."

The learned judge recites the legislation under which the Company was incorporated and proceeds:—

"These are the laws under which the Company came into existence, from which it receives all its powers, and by which they must be limited; they certainly contain no express power to make any contracts for fire insurance, except by policy, and in order as it should seem to secure the solvency of the Company, the exercise of that power is guarded by specific provisions, whereas none are made in respect of fire insurance by parol. To support the direction of the learned judge, evidence was necessary that the appellants had assumed to have the power to make contracts for fire insurances by parol, and held out Murray as their agent for making them, without any restriction. The burthen of proof was entirely on the respondent; the provisions of

the Ordinance and Act of incorporation clearly raise no presumption in her favour.

"Now, what are the remaining facts in the case? There is no evidence of express authority; Murray was the manager for the company; he held an office recognized in the Ordinance and Act, importing very large powers and a wide discretion; but then he was the manager for a company whose powers, in respect of policies at least, were subject to limitations, which were public, and must be taken to have been well-known. He was clearly its agent for granting policies. The evidence, taken in its fair result, shows that whether the practice to pay the premium down, and to issue the policy after such a delay only as the ordinary necessities of business made inevitable, had been absolutely uniform or not; yet that to give credit for the premium, or to take a promissory note for it, payable *in futuro,* and to delay the issuing of a policy indefinitely was very rare; it shows also, that to insure without any policy eventually issuing, was entirely without precedent; that Hays, whose knowledge must be taken to be the knowledge of the respondent, knew all this, and was not deceived; that he had undertaken to her to effect a policy of insurance, not a parol contract of insurance; that his original application was for an insurance by policy, and that it was only his own default, in not being prepared to pay the premium, which prevented the policy from issuing in the usual way, at the usual time. It was he who prevailed on the agent to do the act which is now relied on as binding the appellants. Now, Murray was indeed their general agent; and had he merely made an unwise contract for them, or had he been satisfied with answers which ought to have been deemed unsatisfactory; in these, and many more supposable cases (collusion on the part of the person seeking to be insured being out of the question), the company would have been clearly bound; in all such supposed cases he would have been acting within the scope of the authority which the comapny held him out as possessing. *But if he was, and was known to be, an agent only for effecting insurances by policy on payment of a premium* (*and*

their Lordships see no evidence beyond this) *then he was not their agent in the act which he really did, and they are not bound by it.*"

The crux of this case seems to be that Murray, the general manager, was known to the assured as having no power to effect the insurance except by a policy on payment of the premium, because the judgment itself is a leading authority for the proposition that the agent may bind his principal by acts done within the scope of his ostensible authority on the ground of estoppel.

The powers of the officers of an insurance company are not limited by instructions of which the public are ignorant. The public transact business with the officers and agents, whose names appear upon the instructions issued by the company, and who represent it before the public. If the transaction has such a character as necessarily is included in the general affairs of the company, and if it is carried on by the officers to whom such affairs are confided, the company is not permitted to repudiate it. (5)

The plaintiff had made alterations and additions to his premises, including the placing therein of a steam engine, and applied to the local agent for increased assurance, informing him of the changes which had been made. The agent wrote the plaintiff that the company would take the risk at the rate of the then existing insurance, and enclosed a blank form of application requesting him to fill in the same and return it. Plaintiff objected that the rate was too high, and notified the agent that he would allow the insurance to remain as it was. The evidence showed that the local agent had written to the head office informing them of the change and asking for a rate, and that the plaintiff desired to have the present policy cancelled and a new one issued for an increased amount for the building as it then stood, and enclosing a diagram. The agent received a reply from the company mentioning the rate of the increased insurance now

(5) Provincial Ins. Co. *vs* Roy, 10 R. L. 643.
Vide also Chalmers *vs* Mutual Life Ins. Co. of Sherbrooke, 3 L. C. J. 2.

that steam had been added. Nothing further was done until the then existing policy was about to expire, when the plaintiff received notice from the company of that fact and paid the premium and got a renewal receipt from the local agent. The same thing happened in the following year, and within a month of the granting of the last renewal receipt the fire occurred. The defence was a failure to notify the company and get their consent to the alterations and increased hazard, and the company set up the provisions of the statute that the policy should be void if the risk was increased by any means whatever, and as to this the court said:

"We do not think that the argument should prevail, that because a statute makes a policy void in certain events, there can be no revival thereof by clear acts of the directors recognizing it as still existing, and dealing with the assured and allowing him to pay money or alter his position on the footing or assumption that he is still insured by them...

"Nothing can be more unjust in our view than to hold that the defence now urged should prevail, and that for eighteen months he should be allowed to believe himself insured, and to pay the defendants two annual premiums on such assumption.

"The head office sent down formal receipts, and the local agent countersigns them and hands them to the plaintiff, who pays his money on the faith thereof, his attention never being called to any doubt or suggestion against his insurance." (6)

A policy of insurance was delivered up at the request of the company's agent on the ground of misdescription, and a new one substituted which contained different and more onerous conditions than were contained in the first policy, and the attention of the insured was not called to the difference. The first policy, in providing for the proofs of loss, stated that a certificate should be obtained under the hand of a magistrate or notary public contiguous to the place of fire, while in the second policy the word "contiguous" read "most contiguous". The certificate was from a contiguous magistrate, but not the most contiguous, the

(6) Law *vs* Hand-in-Hand Ins. Co., 29 U. C. C. P., 1.

excuse offered for not obtaining the magistrate living most contiguous to the insured property, being that one of them was incapacitated by drink most of the time, and the other was an enemy of the plaintiff. The blank form furnished the plaintiff by the agent used the words "contiguous magistrate" and not "most contiguous". In pronouncing judgment, Galt, J., said: (7)

"It is to be observed that the first was the only policy which had been in possession of the insured at the time of the fire, and although another policy was delivered to him afterwards, the conditions are much more rigorous, and the plaintiff might very properly have refused to accept it.

"If there was a mistake made in describing the property insured in the first policy, it was the mistake of the defendants, not of the plaintiff, and he should, at any rate, have had an opportunity of objecting, if he thought fit, to the conditions on the second policy. He has, in my opinion (at least in equity) a right to contend that the only conditions binding on him are those which were on the only policy which had been delivered before the fire.

"It may be, and probably was the case, that the second policy had been prepared before the fire, but not delivered.

"We should then have expected in common honesty and fair dealing that the defendants, when they discovered that the proofs furnished were in accordance with the conditions of the first, but not of the second, would have called the attention of the assured to the fact, so that he might have supplied the deficiency or contested their right to demand it, in place of lying by in order to avail themselves of what, under the circumstances, was a most inequitable defence and deprive the plaintiff of his insurance."

In the Court of Appeal, (8) dealing with this point, Burton, J., says:

"I must admit that I am not impressed by the circumstance

(7) Shannon *vs* Hastings Mutual Fire Ins. Co., 26 U. C. C. P. 380.
(8) 2 A. R., 81.

that the local agent furnished the forms on which the proofs were made. It was evidently an unauthorized act on his part, it being in evidence that the company did not furnish forms to their agents for such a purpose, and it would, in my opinion, be a violation of all the rules regulating the relations and responsibilities of principal and agent to hold the company bound by such an act; but I think it was the duty of the company, certainly morally if not legally, on discovering the fact that they were not in accordance with the exact requirements of their conditions, bearing in mind the fact that this policy was not delivered till after the fire, to call their attention to it, and it required but very slight evidence to warrant a jury in concluding that any objection to the strict form of these proofs was waived. The proofs were received on or about the 6th of August. On the 11th of November, the company, not raising then, or previously, any question as to the sufficiency of these proofs, write that they have placed the matter in the hands of the Gore District for adjustment, saving their rights at law. This saving must, I think, be held to refer to any objection to the claim itself, and not to the sufficiency or insufficiency of the preliminary proofs; and having left the matter in that position, they are estopped from falling back upon any technical objection to these proofs." (9)

A COMPANY BY PREVENTING COMPLIANCE WITH THE PROVISION AS TO PROOFS OF LOSS WILL BE ESTOPPED FROM SETTING UP ABSENCE OF PROOFS OF LOSS AS A DEFENCE TO THE ACTION.

The declaration alleged that the 14th condition of the policy required that the plaintiff should give a written statement of his loss within 14 days after the fire, specifying particulars and verifying it in the manner described in the condition. The declaration averred that the plaintiff was ready and willing to give notice within the 14 days as required, but within that time

(9) This decision was reversed on other grounds, 2 Can. S. C. R., p. 394.

the defendants took possession of the goods which remained and prevented the plaintiff from giving the required account and the defendants waived the said condition and discharged the plaintiff from fulfilling it. To this the defendants, by the 5th plea, pleaded the condition in the policy which provided that there could be no waiver except in writing endorsed upon the policy and signed by the general agent, and by their 8th plea set out the 3rd condition of the policy requiring notice of change in the building and averring that there had been such a change and the plaintiff did not notify defendants of it in writing, nor was it allowed by endorsement, nor did the defendants waive such endorsement.

The plaintiff filed a replication by way of estoppel to so much of the 8th plea as alleged that the alteration was not allowed by endorsement, and that the defendants did not waive such non-endorsement, that the plaintiff gave notice in writing of such alteration and delivered the policy to the defendants to have the allowance of said alteration endorsed thereon, and also to have the allowance of a further assurance endorsed thereon, and the defendants accepted said notice for these purposes and waived the endorsement of the same on the policy and discharged the plaintiff from requiring to have the same so endorsed, and afterwards continued and confirmed the said policy. The defendants rejoined to this replication the condition already mentioned that no condition could be waived except in writing endorsed on the policy.

The plaintiff demurrer to the pleas and to the rejoinder and the defendants excepted to the declaration and demurred to the replication.

Held, as to the declaration:

1. That the averment of prevention by defendants was a perfect excuse for non-compliance with the 14th condition; and

2. That the averment of waiver and discharge of the 3rd condition was sufficient. (10)

(10) Smith vs Commercial Union Ins. Co., 33 U. C. R., 69.

Where a policy required that persons sustaining loss should forthwith give notice thereof to the company, and apply for its blank forms, and execute and file the proof of claim, within 15 days after the fire; and the plaintiff gave notice to the insurers' agent, and applied for blanks within the time, but did not receive the blanks until after the 15 days had expired: Held, that the insurers, having by their neglect prevented the plaintiff from obtaining the blank forms and completing the claim within the 15 days, could not take advantage of his failure. (11)

Where the officers of the company prepare the application.

Where the secretary of the company has, at the time of the application, full knowledge of the value of the insured property and himself prepares the application without any previous inquiry of the plaintiff in doing so, he acts solely on his own knowledge acquired in the proper discharge of his duty as such secretary, and if the plaintiff, honestly believing the representations, signs the application so prepared by the secretary, the company is liable. (12)

Notice of vacancy given to General Manager.

On the argument of an appeal, it was contended, as stated in the judgment of Osler, J., that "by the application the plaintiff described the building as being occupied by himself and his tenants as a dwelling house, and thereby contracted with the defendants that it was so occupied, whereas in fact it was at the time vacant and unoccupied; that there was thus an entire misdescription of the subject matter insured, and so the risk never attached...

"To this it was replied in substance that the plaintiff made his

(11) Hammond *vs* Citizens Ins. Co., 26 N. B. Rep., 371.

Vide Caldwell *vs* Stadacona Fire Ins. Co., supra. pp. 78, 83, 95, 131, 208.

(12) Redford *vs* Mutual Fire Ins. Co. of Clinton, 38 U. C. R., 538.

application for insurance at the head office of the defendants, to one Drake, their general manager, and chief executive officer; that he gave Drake all the information he asked for, and told him that the dwelling house was unoccupied; that Drake filled up the application, which plaintiff signed without reading it, and was not aware until after the loss that it contained any incorrect statement...

"It must now, at all events, be taken upon the finding of the jury that the defendants' general manager had notice at the time of the application, and in the course of the transaction, that the dwelling house was unoccupied, and as the defendants rested their defence entirely upon the materiality of the misdescription and not upon a warranty of its truthfulness or condition or stipulation that the policy should be avoided if it was not absolutely correct, the question is to be judged of by their knowledge of the facts when they accepted the risk and issued the policy. The knowledge of their manager acquired under such circumstances was the knowledge of the company. Shannon *vs* Gore District Ins. Co., 40 U. C. R., 188; 2 A. R., 396; Shannon *vs* Hastings, 2 S. C. R., 394, 410." (13)

ESTOPPEL BY CONDUCT OF COMPANY IN CONNECTION WITH PROOFS OF LOSS.

Objections to proof papers and claim cannot prevail where the insurance company wrongfully declined the production of the policy on which they are sued so as to permit of the insured complying therewith. (14)

WHERE THE COMPANY REPUDIATES ITS LIABILITY.

In answer to a notice of loss, the company replied that the policy had expired and they were not liable. Three months afterwards the plaintiff offered to supply full proofs of loss if

(13) Reddick *vs* Saugeen Mutual Fire Ins. Co., 15 A. R., 363.

(14) Mitchell *vs* City of London Ass. Co., 12 O. R., 706; 15 A. R., 262.

required, but the company, while affirming cancellation of the policy, was silent on this point. The trial judge held that apart from the provisions of the statute which gave relief in case of accident, mistake, etc., "the general principles of law as to waiver of conditions for the benefit of the company, show that the attitude of the company was such a repudiation of liability as relieved the plaintiff from proceeding to make formal proofs of loss."

Burton, J. A., in the Court of Appeal put the answer on the ground of estoppel, saying:

"The defendants have estopped themselves by their conduct before the expiration of the 30 days from insisting upon a strict compliance, and the making no reply to the plaintiff when he offered still to supply the proofs if the defendants desired it, should I think equally estop them from insisting on the benefit of any defence founded on this condition." (15)

In this case "waiver" must have been used by the trial judge in the sense of "estoppel" as the 20th statutory condition required the waiver to be in writing signed by the agent of the company.

Calling for proofs of loss may estop the Company from claiming that there never was any contract.

The plaintiff in his application, described the building insured by an illegibly written word that was intended by him for "board", but was read by the defendants as "brick", and they issued their policy upon a brick building, charging a rate for that class of construction, and were not aware until after the fire that the building was a board one. As stated in the judgment of Wilson, C. J.: (16)

"The evidence shews that, about two months after the claim of loss was sent in by the plaintiff, as on a brick building, and a

(15) Morrow *vs* Lancashire Ins. Co., 29 O. R., 377; 26 A. R., 173.
(16) 11 O. R., p. 51.

few days longer than the two months after they knew the building was not a brick building, the company wrote to the plaintiff, Insurance Company, No. 41,659 and that you have been and are by their solicitors, stating, 'You have not yet completed your proof of loss under policy of insurance with the City of London now required to comply with clause 'c' of the 13th statutory condition on the policy.'

"That condition relates to the production of a certificate under the hand of a magistrate, etc., residing in the vicinity, stating he has examined the circumstances attending the fire, etc.

"Three days later, the plaintiff's solicitor sent to the defendants' solicitors the certificate required."

In giving judgment, the same judge said: "The only acts which there are here of waiver are the letter of the defendants' solicitor after the fire, and after action was brought, requiring the plaintiff to furnish the company with the magistrate's certificate, according to the statutory condition 13e, and the plaintiff doing so.

"That does seem like an affirmation of the policy, and these acts were done at a time not only with a full knowledge of all the facts, but with the knowledge of the action pending, and that the plaintiff was insisting on the assertion of his claims for his loss under the policy, treating the description as a mere matter of mistake. I more strongly rely upon the fact of the company's solicitor having upon the 30th of May served a notice upon the plaintiff that the company had appointed Mr. Blakely as the arbitrator for the company, 'to whom the differences which have arisen between you and us respecting *the value of* the property insured, the property saved, and the amount of loss, and the proportion thereof *to be paid by us,* are to be submitted pursuant to the said condition No. 16,' and requiring the plaintiff to name an arbitrator on his behalf, and if he did not do so Mr. Blakely would be the sole arbitrator. This is not strictly a waiver of any condition of the policy under the 20th statutory condition. It is rather an admission by the defendants that the reading of *brick* for *board* was a mistake; so that both parties seem by these later proceedings to be *ad idem* as to that being a

mistake, and so it is a matter for rectification, and not for rescission; and it precludes the defendants from now asserting that no contract was ever made."

In the Court of Appeal, dealing with this branch of the question, Osler, J., says: "It is also to be observed that the defendants have recognized the policy as an existing contract of insurance, whatever defence they might set up to their obligation to perform it, by calling for further proofs of loss, and the magistrate's certificate mentioned in condition 13, after they had notice of the error in the description, a thing they clearly had no right to do except upon the footing of an existing contract."

In the Supreme Court, Ritchie, C. J., says: "In addition to which the defendants clearly recognized the policy as an existing contract of insurance by calling for further proofs of loss and the magistrates' certificate mentioned in condition 13, after they had notice of the error in the description; a thing, as Mr. Justice Osler justly remarks, they clearly had no right to do except upon the assumption that there was an existing contract."

Gwynne, J., with whom Strong, J., concurred, says: "This reference, although not interfering with the defendant's right to dispute the plaintiff's right to recover under the policy (having regard to its conditions) is based however upon the fact of the existence of the policy as a contract between the insurers and the insured, and was a recognition by the defendants of the then existence of the policy. The institution by the defendants of such reference after their attention had been specially drawn to the fact that the building was not brick appears to be quite inconsistent with their present contention, namely, that there never was any contract in existence by reason of the defendants and the plaintiff never having been *ad idem*." (17)

Adjusting loss may operate as an estoppel.

One of the defences to the plaintiff's action was that there was a subsequent insurance effected without notice to the com-

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(17) Smith *vs* City of London Ins. Co., 11 O. R., 38; 14 A. R., 328; 15 Can. S. C. R., 69.

pany. The application for insurance referred to two other concurrent insurances. The local agent of the defendant company, immediately after the fire, notified the defendants of the loss and mentioned the Lancashire Insurance as one of three also on the risk, the Lancashire being the company in which the subsequent insurance was effected. On the same day the defendants' general manager instructed an insurance adjuster to adjust their claim while adjusting that of others. The adjuster prepared the claim papers and had them signed by the assured, and on the same day, on behalf of the defendants and the three other companies also interested, proceeded to appraise and adjust the loss, and returned the claim papers to the defendants with his certificate thereon as adjuster. The claim papers gave the details of the Lancashire and other insurances on the property. The jury found that when appointing the adjuster, who as they knew was adjusting the loss with respect to the Lancashire Insurance, the company intended by such act to treat the policy as valid and subsisting, and the Court of Appeal held in this case that the findings were supported by the evidence, and that the defence was displaced on the ground of assent to such subsequent insurance or of estoppel or of both. (18)

The general agent of the defendant company at H. sent an adjuster to A. for the purpose of adjusting a loss under a policy on a general stock of merchandise owned by plaintiffs, which had been destroyed by fire. The adjuster, without proceeding in the usual way, made an estimate of the amount of the loss, and prepared proofs, which were signed and attested by plaintiffs. The adjuster then returned to H. and handed the proofs to the general agent of the company, who, thereupon, wrote to the local agent at A., informing him that a cheque for the amount of the compromise arranged between the adjuster and K. one of the plaintiffs, would be sent in due course. This adoption of the compromise effected by the adjuster having been communicated to the plaintiffs by the local agent of the company, who was authorized for that purpose:

(18) Mutchmor *vs* Waterloo Mutual Ins. Co., 4 O. L. R., 606.

Held, that the company was bound thereby.

One of the conditions of the policy required the insured to deliver, within fifteen days after the fire, as particular an account of the loss as the nature of the case permitted. In the method of estimating the amount of the loss adopted by the defendant's adjuster, no account of the quantities and descriptions of goods in the store, just before the fire, was given or attempted to be given, and the account was, therefore, in this respect, not as particular as it might have been. Per Ritchie, J. — Held, nevertheless, that as the mode adopted was the one selected by defendant's adjuster, and plaintiffs afforded him every facility and information for making it up to his satisfaction, and he had free access to all books and accounts, there was no reason for setting aside the finding of the jury, that plaintiffs delivered as particular an account of the loss as the nature of the case permitted. Held, also, that the defendant company, after the time for putting in proofs had expired, should not be permitted to object that all possible information had not been furnished, in order that they might estimate the loss in a way different from that selected by their own adjuster and embodied by him in the proofs of loss, when the fullest information that he required was furnished him, and particularly when the jury had found that he represented to the plaintiffs that the proofs furnished were in compliance with the conditions of the policy. (19)

ESTOPPEL BY DEMAND OF PREMIUM.

The plaintiff was insured for 50 days in the defendant company under an interim receipt which read as follows:

"Provisional receipt No. 16, January 13, 1891.

"Received from B. Barnes, post office, Parkhill, an undertaking for the sum of $46.50, being the premium for an insurance to the extent of fifteen hundred dollars, on the property described in his application of this date numbered 16. Subject however

(19) Kirk *vs* Northern Ass. Co., 31 N. S. Rep., 325.

to the approval of the Board of Directors who shall have power to cancel this contract at any time within fifty days from this date, by causing a notice to that effect to be mailed to the applicant at the above post office. And it is hereby mutually agreed, that unless this receipt be followed by a policy within the said fifty days from this date, the contract of insurance shall wholly cease and determine, and all liability on the part of the Association shall be at an end.

"The non-receipt by the applicant of a policy within the time specified is to be taken, with or without notice, as absolute and incontrovertible evidence of the rejection of this contract of insurance by the said board of directors. In either event the premium will be returned on application to the local agent issuing this receipt, less the proportion chargeable for the time during which the said property was insured."

When the fifty days expired, no policy had been received by the plaintiff, nor was any communication made to him for about two weeks, when he was notified by post card, dated the 17th April, as follows:

"Dear Sir:—Your note given for policy No. 19960, amounting to $15.25, falls due on the first day of May next. Please remit promptly, returning this card with cash or post office order.

Yours fraternally,

R. J. Doyle, Manager."

On the 20th April, plaintiff mailed the amount called for by the notice, which was received by the company and entered in their cash book on the 23rd April; but on the 18th April, the company had attempted to cancel the insurance by a communication which read as follows:

"We return herewith undertaking No. 19960 and your short date note. The board have decided not to receive application. Thanking you for the offer of the risk."

This communication reached the plaintiff on the 22nd April, and therefore two days after he had mailed the money demanded.

The fire took place on the 24th. One of the questions before the court was as to whether what had taken place constituted a waiver by the company of the provision in the interim receipt which put an end to the policy at the end of 50 days.

The trial judge non-suited the plaintiff, but upon appeal to the Divisional court, a new trial was ordered on other grounds than those of waiver or estoppel. Upon appeal to the Court of Appeal, the court was equally divided, but Hagarty, C. J., on this point says as follows: (20)

"These conditions as to the fifty days could, I presume be either insisted on or waived by the company. They could treat the contract as avoided by the lapse of the specific time, or as only voidable in their option, and their intention not to treat it as void may be inferred from their actions.

"The loss occurred on April 24th, the day after the applicant's money, sent at their request and demand, was entered in their books. It is true that the manager's letter enclosing the short date not reached the applicant's post office on April 22nd.

"Assuming that the applicant actually received the letter on the 22nd or 23rd of April, he would certainly be in a very unpleasant position if he was to understand that his insurance with the defendants was at an end. The loss was sustained a day or a day and a half after this notice to him.

"Some days after the fire, and with the knowledge thereof, the manager writes again to the applicant returning to him the money sent and entered in their books on the 23rd of April."

On a further appeal taken to the Supreme Court, the court affirmed the judgments below, and substantially for the same reasons, which are dealt with, infra, p. 476, when dealing with the question of notice of cancellation; but on the question of waiver, the court said:

"Upon another point, I also concur with the learned Chief Justice of Ontario. I am of opinion that there was at least some evidence of waiver for the consideration of the jury in the facts,

(20) Barnes *vs* Dominion Grange Ins. Co., 22 A. R., 70.

that the payment of the premium was demanded by the letter of the 17th of April; that it was paid accordingly and retained for six days by the appellants; that at the time the letter of the 17th of April was written the directors had not determined to reject the risk. Whether this is sufficient to establish waiver or to estop the appellants we are not called upon now to determine. All I do say is, that there was some evidence for the jury. I cannot treat the post-card of the 17th of April as the mere mistake of a clerk; of course a jury might so consider it, but it is entirely a question for a tribunal called upon to decide on the facts. No one can deny, that in the interval between the receipt of the post-card and the receipt of the letter posted at Owen Sound on the 20th of April, Barnes was justified in believing that his insurance was carried by the appellants, and that he was thus relieved from the necessity of protecting his property by other insurance." (21)

ESTOPPEL OF COMPANY FROM DENYING IT ACCEPTED APPLICATION ACCORDING TO ITS TERMS.

The plaintiffs applied to the defendants through their agent, one Durham, on the 6th November, 1901, for insurance for one year on their machinery and stock in trade. Next day the agent applied to the defendants to insure the risk, which they agreed to do and fixed the amount of the premium. No written application was made. The premium was not then paid to the defendants, but on the same day they gave the agent an interim receipt which he handed to the plaintiffs, and on the 30th November the plaintiffs gave the agent their cheque for the premium, as for an insurance for one year, which was subsequently received by the defendants, included in a cheque from the agent to them in January, 1902, being the balance shown to be due the company according to a statement then forwarded along with the cheque which showed the premium for the insurance in question. The

(21) Dominion Grange Mutual Fire Ass. Co. *vs* Bradt, 25 Can. S. C. R., 154.

interim receipt contained a provision that it should only operate for 30 days, but the plaintiffs did not become aware of that fact until after the loss. The fire took place in the October following, and the company disputed their liability.

The trial judge, Meredith, C. J., held that the defendants were liable on two grounds. The first was that by the second statutory condition the plaintiff was entitled to receive a policy in accordance with the terms of his application; and as to the second ground the Court said:

"The defendants as I have found accepted and even if they did not accept are, I think, estopped by their conduct and dealings with the plaintiffs from denying that they accepted their application for insurance according to its terms, and if that be so, their acceptance of the proposal created a binding contract for an insurance for one year, which was subsisting at the time of the loss, not having been put an end to in the only manner in which it could be put an end to without the consent of the plaintiffs."

On appeal to the Court of Appeal, (22) this judgment was affirmed on the first ground taken by the court below. (23)

THE COMPANY MAY BE ESTOPPED FROM ALLEGING NON PAYMENT OF PREMIUM BY KEEPING SILENT WHEN UNDER OBLIGATION TO SPEAK.

The plaintiff's husband had an insurance in the defendant company and by one of the conditions, 30 days' grace for payment of a premium was allowed if the insured were unable to do so when it became due, which, in this case, the plaintiff stated to be the fact. The Insurance Act, R. S. O., 1897, c. 203, s. 148 (i), provides that the payment of any premium not being an initial premium, might be made within 30 days after becoming due by the insured or his beneficiary under the contract, when it would ipso facto be revived or renewed, any stipulation to the

(22) 9 O. L. R., 35.

(23) Coulter *vs* Equity Fire Ins. Co., 7 O. L. R., 180.

contrary notwithstanding. The insured died about ten days after a premium had become due, leaving it unpaid. A firm of solicitors, acting for the insured's family, at once notified the company of the death, and not knowing whether or not the premium had been paid, but, thinking that payment might have been overlooked, asked, if it had not, to advise them, and they would pay it. Subsequently on the same day, the plaintiff called at the head office and saw the secretary, who, with full knowledge of the fact of such non-payment, stated in answer to her enquiry, that the policy was all right, so far as he knew. The solicitors' letter had been handed over to the company's solicitor with instructions to answer it, which he did, by merely asking them to send in proofs of loss, and that the matter would receive prompt attention, making no answer to the enquiry as to non-payment. Administration was taken out by the plaintiff and proofs duly furnished, and it was not until some months afterwards, on the solicitors' enquiring when the amount of the policy would be paid, that they were informed that the company contested payment for non-payment of the premium:—

Held, that the plaintiff was a beneficiary under the contract and entitled to make a claim under the policy; and that the company were estopped by their conduct from setting up the non-payment of the premium.

The trial judge in his judgment says as follows: "I think, upon the facts before me, that I may infer that the secretary was entitled, as within the scope of his authority, either general or particular, as far as this case is concerned to answer the questions put to him by the plaintiff in the way he did, and to direct the solicitor to manage his part of the business in the way he did, and that the board of management approved of this method of dealing with the plaintiff. What leads me to that conclusion is that the letter written by Crerar & Crerar, addressed to the manager of the defendant company, seems to have immediately passed into the hands of the secretary, and to have been considered by him along with the documents that accompanied it, and then, of his own motion apparently, transmitted to the

solicitor for his opinion; that when the plaintiff called at the defendants' place of business the secretary seems to have been the person, and the only person to whom she could address the enquiries she did address to him; and that the secretary's evidence tends, as I think, to shew that the management of such matters was left largely to him. I think, therefore, that I am warranted in drawing the inference that I do; that when he made the answer to the plaintiff which he did make he was acting within the scope of his authority, or of his apparent authority, in such a manner as to entitle the plaintiff to rely upon his statement in the matter, and that that authority was conferred upon him, or is made to appear as if so conferred by the defendants' board of directors, and was therefore binding upon the defendants as between them and the plaintiff."

In the Divisional Court, Boyd, C., says: "I agree with the conclusions by the trial judge and jury that the facts disclose a case of estoppel against the company whereby the conduct and statements as well as the silence (when it was a duty to speak) of the company's agents operated to mislead the plaintiff and lull her into security during the currency of the days of grace."

Meredith, J., says: "The secretary, well knowing that the premium had not been paid and that the days of grace had not expired, and having before him the letter of the solicitors pointedly asking whether it had been paid, and stating that if it had not they would see to the payment of it, instead of telling the truth said, that so far as he knew the policy was all right, a mis-statement or concealment of fact—not a mere expression of opinion—intended to be acted on by the plaintiff, and acted upon by her in the faith of its being disingenuous and true. No one can doubt that if the truth had been told the premium would have been paid or tendered within the 30 days. The purpose of the plaintiff's journey to the defendants' head office and the object of her enquiry were obvious; whether the secretary was bound to tell anything or not, he was bound, if he chose to tell anything, to tell the truth, not to mislead her—to lull her into a sense of security, to her loss."

In the Court of Appeal, the Court said: "There are two reasons which preclude the defendants from setting up the non-payment. There was what took place at the interview between the plaintiff and Joliffe when Joliffe was asked by the plaintiff if the policy was all right and he answered that it was all right so far as he knew, he knowing at the time that the plaintiff would act on his statement; and it is proved that Joliffe had authority to act for the company. Then there is the letter from Messrs. Crerar & Crerar suggesting that the payment of the premium may have been overlooked, and saying that if it had not been paid they would see to the payment of it—to which the only answer made was to send in proofs of loss, nothing being said about there being any payment in arrear or any payment to be made. The writer of the letter was authorized to deal with the matter and was aware that the payment had not been made. Under these circumstances the defendants cannot now be allowed to say that there was no payment or tender of payment."

The judgment of the Court of Appeal was affirmed by the Supreme Court at the hearing, without calling on counsel for the respondent. (24)

2. General Agents.

The definition given by Gwynne, J., in Campbell *vs* National Ins. Co., (25) and the power and authority of such agents, has been accepted and adopted by the Canadian courts in later decisions:

"The general agents of a foreign company doing business in this country must, I think, for the purpose of receiving premiums, be regarded in the same light as the company, themselves, and we must, I think, hold that the payment made to such agents is the same as if made at the head office abroad, and that the knowledge and information brought home to the general

(24) People's Life Ins. Co. *vs* Tattersall, 9 O. L. R., 611; 11 O. L. R., 326; 37 Can. S. C. R., 690.

(25) 24 U. C. C. P., at p. 144.

agents at the head office in this country must be regarded in the same light as if it was possessed by and brought home to the head office in the foreign country."

In Moffatt *vs* Reliance Mutual Life Ins. Co., (26) Armour, J., has this to say with respect to the power of general agents: (p. 578):

"Mr. Stancliffe was the secretary, resident in Canada, of the board of directors in England, was appointed by them, and communicated directly with them, and was the organ by which they communicated their will to all those transacting business with the defendant company in Canada, and his sayings and doings with respect to the business of the defendant company carried on in Canada are to be regarded in the same light, so far as the defendant company are concerned, as the sayings and doings of Mr. Butler, the secretary resident in England of the board of directors in England, with respect to the business of the defendant company carried on in England, would be.

"He was also the general manager of the defendant company of all the business carried on by them in Canada, and would, according to the decision of the Court of Common Pleas, in Campbell *vs* The National Ins. Co., 24 C. P., 133, and according to numerous decisions of the highest Courts in the United States, have, the board of directors being in England, the same general and ostensible authority to make arrangements for the payment and forbearance of payment of premiums payable in respect of policies effected in Canada, as the board itself would have."

The defendant, an insurance broker, was the agent in Montreal of two foreign insurance companies, one of which instructed him to cancel a certain risk in Montreal, which the defendant had accepted. After suggesting a reconsideration, and the order being repeated, he complied, and he then immediately transferred the insurance to the other company for which he

(26) 45 U. C. R., 561.

was agent, without informing them that the risk had been refused by the first company. He made the transfer, moreover, without the knowledge of the insured and without notice to them. On the same day a fire occurred in the premises insured, and the loss was paid by the company to which the insurance had been transferred. In an action afterwards brought by the latter against the agent, to be reimbursed the amount of the loss which they alleged they had paid without cause, and upon false representations by the agent:—Held, affirming the judgment of Wurtele, J., (M. L. R., 5 S. C., 262), that the transfer of the insurance being made by the defendant in good faith, before the fire occurred, and in accordance with the custom of insurance brokers in Montreal, there was no fraud on his part, and he could not be held liable. (27)

Under these holdings of the Ontario courts it would appear clear that the general principles of estoppel applicable to conduct of the officers of the company at its head office are equally applicable to the general agents who represent foreign companies in Canada.

3. Local General Agents.

There is a dearth of Canadian authority dealing with the extent to which the company will be bound where the agent has original authority to sign the policy, but the American cases hold that his authority is commensurate with that of the company itself up to the time of the loss.

The result of the American decisions is stated in the following language by a leading authority: (28)

"These (local general) agents have authority to negotiate contracts of insurance, within limited territory; to collect the pre-

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(27) Connecticut Fire Ins. Co. *vs* Kavanagh, 21 R. L., 320, M. L. R., 7 Q. B., 323. Affirmed by the Privy Council (1892), A. C. 473, 15 L. N., 308, the Privy Council refusing to allow a new issue as to allow a new issue as to negligence to be raised in appeal.

(28) Ostrander, on Fire Insurance.

miums, countersign and deliver policies; and to do all things necessary to be done on the part of the insurer to make the policy an effective contract of indemnity. The powers of this class of agents are usually plenary in respect to all ordinary hazards. They are usually intrusted with policies signed in blank by the officers of the company, in which they have been authorized to write the names of the parties to be insured, the sums covered, and a particular description of the property to which the insurance relates. The powers of this class of agents may be, and doubtless are, in most cases, particularly set out, and fixed in definite terms, by a written commission, or letter of instructions. When this is done, and the agent acts in excess of his authority, or fails to act when required, he will be liable to his principal for any injury he may have sustained by such misconduct. While a person dealing with an agent is put upon inquiry in reference to his authority to act, he is not bound, in the same manner that the agent is, by the restrictive instructions which the latter has received from his principal. He may judge of the agent's authority by what he is permitted by his principal to do. If it is known that the agent makes contracts of insurance, waives policy conditions, and does all things which the principal himself could do in the management of the business, and his acts are ratified, general powers may be safely inferred. The authority actually given the agent is generally private, but here is an apparent authority which will justify those dealing with the agent in supposing that his powers are plenary in respect to all matters preliminary to, and eventuating in, a completed contract of insurance. Agency will not be presumed. It must be shown. But it will be sufficient to establish that the alleged agent has acted in the relations named with the approbation of the principal; that he has been held out as having the powers claimed. The secret instructions of the principal, defining and limiting the authority of the agent, are important only in fixing the liability of the agent to the principal when disobedience or other misconduct occurs. Where, however, the limitations imposed upon the authority of the agent

are brought to the knowledge of the insured, if he thereafter deals with him when acting in excess of such authority he will do so at his peril.

"All insurance companies have prohibited risks, and all, too, impose prudential restrictions concerning lines. There are limitations to the liberty and power of the agent in the acceptance of the risk, concerning which he is fully instructed, but of which the public is not generally informed. Should the agent issue a policy on an interdicted risk, or accept a larger line than he had been permitted to write, and a fire should result before the policies were cancelled, the insurer would be charged with the loss, as, in the absence of any definite information in regard to the powers of the agent, the public would be justified in presuming that, in the selection of risks and fixing of lines, he was acting within the scope of his authority."

The Supreme Court of Canada, thus states the powers of local general agents:

"Local agents are considered to occupy a more subordinate position, and their powers are generally more limited. To bind a company for all the acts of local agents, often of little experience, in every hamlet or village, would be widely different from binding them for the acts and dealings of a general agent selected on account of his special business knowledge. The latter often act under powers of attorney and issue policies without consulting the head office, and in other cases policies are issued to them in blank fully executed by officers of the company, and requiring only to be filled up and countersigned by the agent. In the latter cases, also, policies are issued without consulting the head office. In such cases the agent is virtually the company." (29)

As illustrative of the extent to which these local general agents may bind the company, the case of the Canada Fire & Marine

(29) Ottawa Agricultural Ins. Co. *vs* Sheridan, 5 Can. S. C. R., 157, per Henry, J.

Ins. Co. *vs* The Western Ins. Co. (30) may be cited. In this case, the head office of the plaintiff company was in the City of Hamilton, and they had an agent in Montreal named Bethune, who was also the agent of the defendants for the purpose of effecting marine insurance and re-insurances. The company was not experienced in marine insurance, and relied upon their agent who was an expert in the business, and gave him the following extensive powers:

"Power to receive proposals for insurance, to fix rates of premium, to receive moneys, to countersign, issue and renew and consent to the transfer of policies, subject to the rules and regulations of the said company and such instructions as may from time to time be given to its officers."

The following statement is taken from the pleadings (26 Grant, 264): The bill alleged that in 1877 and previously the plaintiffs carried on business in Montreal through one Bethune, as their agent, who was also the agent of the defendants there for the purpose of effecting marine insurances and re-insurances; that plaintiffs defined the extent of the authority conferred on their agent as follows: "With power to receive proposals for insurance, to fix rates of premium, to receive moneys, to countersign, issue and renew, and consent to the transfer of policies, subject to the rules and regulations of said company and such instructions as may from time to time be given to its officers;" that on the 30th of October of that year certain parties shipped a large quantity of wheat and other grain for Great Britain in certain vessels, one being named "Northumbria", then lying in the port of Montreal, and insured such wheat and grain against the perils of navigation in various insurance companies, and amongst others in that of the defendants, through Bethune, acting as their agent, for the sum of $7,700, and he immediately thereafter reported to the defendants that he had re-insured $2,700 of such risk, not stating in what company such re-insurance had been effected; that on the 14th of November plaintiffs for the first time received information from Bethune that he had issued a certificate, or policy of the plaintiffs, No. 199, dated on

(30) 26 Gr., 264; 5 A. R., 244.

the 30th of October, re-insuring that amount, and on the 19th of the said month of November the plaintiffs received from Bethune a letter dated the 16th of that month containing the following information, and nothing further regarding such risk: "I am afraid we are going to sustain a considerable loss by the Northumbria; she is stranded on Anticosti:" and on the 14th of December following the defendants made an application to the plaintiffs for payment of such re-insurance of $2,700, and such claim was approved by Bethune, who drew on plaintiffs for the amount, and they, relying on the good faith of their agent, and believing from the representations made by him that he had, before the loss happened, or at all events before he became aware of it, entered into a legal and binding contract on behalf of the plaintiffs, and that they were legally liable for that amount paid the same.

The bill further alleged that in February 1878, Bethune ceased to be an agent of the plaintiffs in Montreal, and a new agent was appointed, and that in May following, the plaintiffs received information which led them to believe that such certificate of contract of re-insurance had not in fact been issued to or entered into with the defendants until after the loss had occurred, and Bethune had information thereof; that information of the stranding of the vessel was received in Montreal about noon of the 13th of November, and Bethune heard of the loss about the same time, and then set about to make good his report to the defendants as to his having re-insured, and then prepared the said certificate No. 199, dating the same back, and issued the same to himself as agent of the defendants, and on the evening of that day reported the issue thereof to the plaintiffs, but withheld all information as to the loss, though in possession of such information at the time; that next day Bethune reported the loss to the defendants, but did not report the same to the plaintiffs until three days later.

The bill further stated that the defendants sometimes pretended that Bethune at the time of effecting the insurance for $7,700 in the defendants' company, made a promise to himself

as agent of the defendants, or entered a note or memorandum in the registration which he kept of the defendants' business at Montreal, that $2,700 of said insurance was to be re-insured with the plaintiffs, and that the plaintiffs were bound by such promise or note or memorandum; but the plaintiffs insisted that no such note or memorandum was made or entered until after Bethune knew of the loss; but that if the same were made or entered before knowing of the loss it was done by Bethune as agent of the defendants, and that plaintiffs could not be bound thereby, as the Act incorporating the plaintiffs (39 Vic. ch. 51, sec. 15) requires that "all policies or contracts of insurance issued or entered into by the said company shall be signed by the president, or one of the vice-presidents, and countersigned by the managing director, or secretary, or otherwise, as may be directed by the by-laws, rules and regulations of the company, and being so signed and countersigned shall be deemed valid and binding upon the company, according to the tenor and meaning thereof," and that therefore the plaintiffs could not be bound by any verbal contract of re-insurance, or by any mere informal unsigned memorandum.

The prayer of the bill was, that such certificate or contract of re-insurance might be declared to have been fraudulently signed and issued by Bethune to the defendants, and the same declared void *ab initio;* and that the sum of $2,700 had been paid to the defendants by the plaintiffs in consequence of the fraudulent conduct of Bethune, and that plaintiffs were entitled to recover back the same.

The defendants answered the bill setting up that prior to the 30th of October 1879, the plaintiffs had issued to the defendants an open policy of insurance, No. 202, duly signed and countersigned, as required by law, but which since the happening of the events set forth in the bill had been handed back to the plaintiffs, and defendants were unable accurately to state the contents thereof, but the same was in full force and effect at the time when the said re-insurance was effected and fully covered the risk in the bill mentioned, and rendered the plaintiffs liable

on the happening of the events set forth in the answer; that on the 13th of October the defendants having effected the insurance on the grain in the Northumbria for $7,700, their inspector, William Leslie, applied to Simpson & Bethune, as agents of the plaintiffs, for a re-insurance of $2,700, and as such agents they accepted the same, and such re-insurance was effected according to the conditions of such open policy, and the application was made and accepted in the usual and invariable course of business in such cases, and the course of dealings theretofore adopted between the plaintiffs and the defendants, and that to repudiate such a course of dealing would be a fraud on the defendants; and that on the 1st of November the defendants received from their agents in Montreal a daily report of cargo risks which set forth the said re-insurance of $2,700; that about that date Simpson & Bethune dissolved partnership, and Bethune alone continued during the remainder of the year 1877 to act as agent of the plaintiffs.

The defendants further alleged that subsequently they received from Bethune a cargo certificate, bearing date the 30th of October 1877, and dated at Hamilton, duly signed by the general manager of the plaintiffs, certifying that the defendants were insured under and subject to the conditions of the said cargo policy No. 202, in the sum of $2,700, and submitted that whether the said certificate was or was not made under the circumstances detailed in the bill their rights on the one hand and the liability of the plaintiffs on the other were the same, and that the liability of the plaintiffs accrued from the acceptance by the plaintiffs' regularly constituted agents of the risk, and which was duly noted by such agents in their re-insurance book at the time such re-insurance was effected; and that the only purport and effect of such certificate was an acknowledgment by the general manager of the plaintiffs that such re-insurance had been effected under and subject to the conditions of the said policy; and the defendants submitted that they paid the plaintiffs the premium upon the said re-insurance at the time and in the manner, and according to the well established usage in such cases, and that they had done everything that was necessary,

usual, or proper for them to do to entitle them to receive the $2,700, which they admitted having been paid to them by the plaintiffs.

The cause having been put at issue, evidence was taken before the Court, the effect of which sufficiently appears from the judgment.

The following facts are extracted from the judgment of Blake, V. C.:—Mr. Bethune had no power to insure for the defendant company on a risk to a greater extent than $5,000, and having received an application to the Western for $7,700, he re-insured the risk to the extent of $2,700 in the plaintiff company. The evidence showed that the agent Bethune had given instructions to his clerk for the preparation of an application, and his clerk said that he then entered in the proper book the fact of the re-insurance and prepared and handed to another clerk the application showing the amount of the risk and everything connected with it.

The way the business between the plaintiff company and Mr. Bethune was transacted was that a form of policy was sent from the manager in Hamilton to the agent at Montreal, which guaranteed an insurance for any marine risks not exceeding $5,000 each, which the agent might see fit to write in the policy. The mode of covering a risk by the policy was to insert on the back of it the risk, the rate, the amount, and so on. The Vice Chancellor held that this constituted the insurance, and the insurers then occupied the same position as if the policy received by the agent had written on the back of it "This policy of insurance in favour of the insured is issued as if direct from Hamilton in their favour." And he further held that the sending of a certificate to the head office, which was customary when an insurance was effected, was not necessary for the purpose of putting the company on the risk, and, finding that there was no fraud in the transaction, he gave judgment for the defendants.

On appeal this judgment was affirmed, Moss, C. J., saying: (31) "It appears to me, upon the whole evidence, that

(31) 5 A. R., at p. 252.

there was a valid and binding contract of insurance. There is nothing in their charter which prohibits them from authorizing an agent to effect an insurance in any form that the exigencies or conveniences of business might render expedient. There is nothing in the evidence which, when fairly weighed, leads to the inference that they had the slightest intention of placing any restriction upon the powers of their agent. It seems to me that there is much justification for the observations of the learned Vice-Chancellor that the position of principal and agent were here inverted. It is quite certain that to him they looked for instruction and guidance as to the best mode of transacting their marine business. In that their home-officials had no experience, while with Bethune it was a specialty. The directions, meagre as they were, which they did give, were not meant for limitations of his authority, but as means of apprising them of the amount and character of the obligations into which he had entered on their behalf. They were well aware that he also represented the defendants, and that it was the practice to give them an interest in the risks which that company had assumed. yet they never gave him any special or extraordinary directions as to the manner in which that particular business was to be done, or those transactions authenticated. They are, therefore, in no better position — I am far from saying that they are in an equally good position — as if the defendants had, through an independent agent, applied to Mr. Bethune, on the 30th October, to effect a re-insurance. I confess that, considering the powers Bethune had actually received and ostensibly enjoyed, it appears to be beyond reasonable doubt that upon the state of facts found by the Vice-Chancellor he would have made the plaintiffs liable to the defendants. The case would have been simply that of an agent of the latter applying to an agent of the former, possessing the plenary powers described in the evidence, to effect a re-insurance, of that application being accepted, of the acceptance being communicated, and of the consideration being given. I mention the latter circumstance because I take it to be indisputable that the plaintiffs had sanctioned and ra-

tified the course of dealing by which the defendants were merely charged with the amount of premium at the time. In fact, a moment's consideration shews that this was the necessary result, during the interval elapsing before his next report, of the double agency of Bethune. A payment from one company to the other by him during that period was a mere matter of book-keeping. I should certainly be amazed, and I think the mercantile community would be startled, if authority could be found for the proposition that under such circumstances the plaintiffs could have repudiated liability because the defendants' agent had not cared to obtain a certificate of re-insurance — a certificate, it will be observed, which would not have been signed by the president and secretary, but by the latter alone, and with respect to the issue of which it was never intended that the least discretion should be exercised by any representative of the company but Bethune.

"I am, therefore, prepared to hold that there was a contract to re-insure binding upon the plaintiffs.

"In my opinion the appeal must be dismissed, with costs."

Patterson, J. A., says: "There was the written application by the Western Company to the Canada Fire and Marine. There was the express acceptance of the offer verbally made by Mr. Bethune. It was decided to re-insure this particular risk with the plaintiff company, after a discussion between Mr. Bethune and Mr. Leslie, while the other two risks were given to another company, not because this company was preferred as the safer of the two, but because the risk was considered the best of the three. The selection was made in the interest of the plaintiff company, not in the interest of the defendants. It was thus a good deal like an offer or request from the plaintiffs, acceded to by the defendants. So far therefore as a verbal acceptance by the agent of the plaintiffs could operate to bind the plaintiffs, that fact may be taken as clearly established. On the part of the defendants there was the offer or application, which was thus accepted—there was the communication of the transaction to

the head office, in addition to what was itself an effective communication from the very nature of the business as done by the agent; there was the placing or the attempt to place the accepted application in the usual course for the preparation of the more formal documents; and there was the payment of the money according to the system in force between the companies.

"I think, that setting aside any question as to Mr. Bethune's authority, these acts were sufficient to create a contract to insure, which under the law of this province entitled the defendants to demand a valid policy.

"Then as to the agency. It has been urged by Mr. Blake for the plaintiffs, that the mode in which it was intended that their business should be conducted, and to which I have already adverted, being shown, and it being also apparent that the business of the Western Company was conducted on the same system, there should be considered to exist a limitation of the agent's power to bind his principals by business done in that mode only, and that each company should be taken to have had notice that the other had so limited his authority.

"It does not strike me that this view can reasonably be taken of the evidence. The plaintiffs could, if they had so desired, have given specific instructions to their agent confining his powers within well defined bounds, and guarded their dealings through him so as to avoid creating a belief in those with whom they did business that his authority was more extensive.

"They did nothing of this kind.

"The secretary said upon his examination in the cause, 'If Mr. Bethune on the 30th of October, had received instructions for the risk and had received money for it, but had not issued the certificate, I should say, that he as agent had power to bind the company for any reasonable time while the certificate was being made out; by a reasonable time, I mean during the same day, but not longer; if the agent delayed for a week to make out the certificate I should say it depended upon the particular circumstances of the case as to whether the company would be bound or not, if the agent was only authorized to receive risks

and issue the certificates forthwith on receipt of the premium. We gave the agent instructions only as to the lines which he was to write, but no instructions as to the time within which he was to issue certificates; we gave our agent no form for receiving applications for marine risks, nor any instructions as to the manner in which he was to receive them; he was authorized to bind our company in marine business without referring to the head office; he was to report each day what risks he had put us on.'

"Suppose the agent had given a certificate on 30th of October, and had reported the risk in his daily return for that day; and that after the loss, the plaintiffs, upon production of the certificate, and after referring to the daily report, had paid the money, but had subsequently discovered that the risk had not been endorsed upon the policy; could it be reasonably contended that under these circumstances they could have insisted on the money being returned to them? I should say clearly not. Yet there would have been no such legal contract as the statute calls for. The certificate would have stated that there was such a contract, but that would have been untrue. So would the return. But these instruments would have been pretty conclusive evidence of an acceptance of the application, and a communication of that acceptance to the assured — in other words, of an agreement to insure. They would not have been a policy, but they would have proved an agreement upon which the issue of a policy could have been enforced.

"The evidence of such an acceptance and agreement before us may be less distinct, but that is a question of degree only. The fact that there was such an acceptance results from the facts found by the Vice-Chancellor.

"In my judgment the agent was authorized to bind the company by that acceptance.

"I think the plaintiffs have failed in establishing a case for repayment of the money, and that the appeal should be dismissed, with costs."

But if the insured knows, or must be taken to have known

that the local general agents have no power to alter a policy issued from the head office, the company will not be bound by any alteration made by the local general agent. (32)

4. Local agents.

It is with respect to this class of agent that most frequently the courts have applied that principle of estoppel which was enunciated in Montreal Assce. Co. *vs* McGillivray, supra, pp. 19, 21, 218, namely that *an agent may bind his principalby acts done within the scope of his general and ostensible authority although these acts may exceed his actual authority as between himself and his principal.*

With respect to the extent to which an insurance company will be held estopped by the conduct of its local agents, it will facilitate the inquiry to consider in the first place the method and procedure by which fire insurance contracts are commonly entered into.

It is the custom of Companies in Canada to employ agents throughout the country who have authority to solicit applications for insurance and to bind the company for a short term contract, usually extending over thirty or sixty days.

For the purpose of entering into such contracts, the agent is furnished with certain printed forms, having blanks which require to be filled up. These forms consist of the application, the interim receipt, and, where the insurance is on the assessment system, a premium note.

The Application.

The application, where written, contains inquiries intended to cover all the facts and circumstances material to the risk, and as forming part of the application, there is a plan or survey showing the property insured and the existing conditions of the risk as regards surrounding buildings. Where the property in-

(32) Piggott *vs* Employers Liability, 31 O. R. 666; infra p. 327.

sured is in cities and towns the reference is usually to the plans and surveys prepared by the insurance companies, and popularly called "Goade's Plans."

It is presumed that the company has included in the questions contained in the application all matters with respect to which it requires information as being material to the risk .(33)

The applications of some insurance companies contain a clause expressly warning the assured that if the agent soliciting the risk takes part in the preparation of the application, he shall for such purpose be deemed solely the agent of the applicant and not of the company. The presence of such a clause, as will be pointed out later on, becomes of the highest importance in considering how far a company is estopped by the conduct, advice or representations of its agent.

In the applications of some mutual insurance companies that insure only a certain class of fire hazards, there is frequently printed prominently upon the application, a notice to the applicant calling his attention to the excluded risks. In such case, the agent having no power to receive applications for insurance on subject matters excluded from the risk which the company undertakes, if notice is given to the applicant by the application that such matters are not the subject of insurance, it is impossible on any principle of estoppel to hold the company liable. This view was that held by the Court of Chancery (34) in a case in which the facts were as follows:

The plaintiff's application contained, in larger type than the body of the document, and in a conspicuous place, the following notification to the applicant: "Only farm buildings, dwellings, out-houses belonging to them, country school-houses, churches, meeting-houses, and the out-houses belonging to them, are insured." The agent undertook to insure grain in stacks. The interim receipt read as follows: "Received of—premium note for—,... for an insurance of... with the... Company, agree-

(33) Klein *vs* Union Ins. Co., 3 O. R., 234.
Vide also Laidlaw *vs* Liverpool & London & Globe, infra, p. 287.
(34) Henry *vs* Agricultural Mutual Ass'ce. Co., 11 Gr., 125.

ably to his application to that effect subject to approval by the Board of Directors, money and note to be returned in case application is rejected. Mem.—If applicant does not receive his policy within four weeks and is not notified of the risk being declined, he is recommended to write to the secretary on the subject."

The risk was declined and notification sent to the plaintiff at his post office address within two weeks, but the plaintiff not having applied at the post office, never received the letter of refusal until after the fire. Upon this state of facts Vice-Chancellor Spragge, said:

"The applicant for insurance had a right to assume that the agent had the ordinary authority of insurance agents receiving applications, unless informed otherwise by the agent, or by papers to which he, the applicant, was a party... The printed form of application contains information as to what is insurable. The applicant makes this his own act. It is given to him by the agent as containing the form of application which he is to make, and informs him of what the company is prepared to insure, and by inference that it insures only what is enumerated... This proposal is not a proposal only, but contains notes by the company for the information of parties applying to insure. If it informs applicants that it insures only certain classes of property, it necessarily informs them that their agents' authority extends only to the insurance of such property. It might be that this information was conveyed in such a way or form, that a person of ordinary intelligence, and giving such ordinary attention as a prudent man would give to a matter of business, might not observe it... And I should be disposed, if the language used were ambiguous, or if the information as to the classes of property which only the company would insure, were inserted in an obscure place, where the applicant would not look for such information, to hold the information not conveyed; but I cannot say that the paper is faulty in either of these respects. If read through by Henry, and it was his business, if he desired to be safe, either to read it or have it read to him, he would have learned that the

company did not insure stacks of grain, and therefore that the agent had no authority to do so. If he omitted this common business precaution, it was either because he was careless, or because he trusted to what the agent said to him. If he did either it was his own fault, and he, and not the company should, bear the consequences."

This decision was not followed, nor in fact referred to in Cockburn *vs* British American. (35)

The facts of that case shortly were that the application signed by the assured contained this endorsement: "Special: To be submitted to the company for approval before receipt is issued... Applications for insurance on property where steam is used for propelling machinery must be approved by the head office at Toronto before the company will be liable for any loss or damage."

The plaintiff's attention was not drawn to these endorsements, and he was not aware the agents had no authority to grant the interim receipts on this account. The application was either never received, or mislaid by the company, and was refused on the 13th October and a letter sent on that date to the agents, notifying them of the fact, but the agents failed to inform the plaintiff of the refusal, their reason for so doing being that the company had not returned them the money paid by the plaintiff, so that they might refund it to him. The fire occurred on the 26th October. The note of the case does not show the period over which the insurance was to extend. The judgment of the Divisional Court was given by Chief Justice Armour, who, referring to the endorsements on the application, says:

"These indorsements formed no part of the application required to be signed by the plaintiff Cockburn, nor were they ever brought to his notice, and when he made the application and the interim receipt was issued to him the agent issuing it was acting in the apparent scope of his authority, and was to be deemed *primâ facie* to be the agent of the company. These in-

(35) 19 O. R., 245.

dorsements were rather instructions to the agent than warnings to the applicant... The defendants, moreover, never repudiated the contract of insurance which purported to have been effected by the application of the plaintiff and the interim receipt issued to him, but merely determined to put an end to it, treated it as a subsisting contract and elected to retain the premiums earned thereunder from the time it was made up to the time when they determined to put an end to it and so approved of the contract so made."

It is submitted that in so far as the latter case is inconsistent with the principle above expressed, and the decision in Henry *vs* Agricultural Mutual, it is not good law. The applicant should be held bound by information as to the character of the risk which the company only undertakes to insure expressly brought to his attention when the application is made. And this for the same reason, and in accordance with the same principle as he is held bound under the exception from the company's liability hereafter expressed, (infra, p. 270,) where limitations upon the agent's power are expressly brought to his notice at the time of the application.

THE POWERS OF THE LOCAL AGENT TO BIND THE COMPANY BY ESTOPPEL MAY BE CONSIDERED UNDER THE FOLLOWING HEADS:

First. With respect to the interim receipt.

Second. Effect upon the policy, of misrepresentation in application.

Third. Estoppel of company by conduct of agent after issue of policy and before loss.

Fourth. Estoppel after loss.

FIRST. WITH RESPECT TO THE INTERIM RECEIPT.

The local agent represents the company for all the purposes of the interim contract.

We propose now to establish, by reference to the Canadian decisions, that although the local agent who, as between himself and the company is a special agent having authority only to issue interim receipts, binding for a limited period, nevertheless by the application of the principle of estoppel he is held to represent the company in making such interim contract, and thereafter while the same subsists, for all purposes of the insurance not inconsistent with the limitations upon his powers clearly shown by the documents evidencing the contract. (36)

In a comparatively recent case, where the action was brought against a Mutual Ins. Co., that accepted a promissory note for the premium in lieu of cash, the Chief Justice points out that the contract in that case was to be found in the application, the promissory or premium note, and the interim receipt. (37)

To elucidate the proposition set out above, it will be useful to consider in detail some of the leading cases decided by our Courts.

The plaintiff had been insured under an interim receipt which read: "Received of.. .. ..the sum of $.. .. ..being the premium on an insurance to the extent of.. .. .. ..on property.. .. .., subject to the approval of the Board, the said party to be considered insured for twenty-one days from the above date, within which time the determination of the Board will be notified. If approved, a policy will be delivered, otherwise the amount received will be refunded, less the premium for the time insured."

The agent notified the plaintiff that his application had been accepted by the Board, which the Company denied ever having

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(36) This general statement of the law must be read subject to the general rule applicable to all insurance contracts that the premium is *prima facie* invariably payable in cash, except where, as in mutual companies, a premium note is given, subject to assessment; and only the most positive evidence that the company has permitted the agent to abrogate the rule will suffice to permit the insured to set up in any case waiver or estoppel. (*Supra*, p. 30 et seq.)

(37) Dominion Grange *vs* Bradt, 25 Can. S. C. R., 154.

authorized him to do. Chancellor William Hume Blake, in pronouncing judgment, said:

"Newbury was agent for the defendants to say whether or not the insurance was accepted. He said it had been, and this was binding on the Company."

Spragge, V. C., said: "The local agent must, in my opinion, be treated as the officer of the company to communicate with persons effecting insurances, and what he says or does in that capacity within the proper bounds of his authority, must be held binding on the company." (38)

Where the interim receipt read as follows:

"Received.. .. .., being the premium of insurance on property for twelve months, and for which a policy will be issued.. .. .. .. within 60 days, if application is accepted, etc. Otherwise this receipt will be cancelled and the amount of unearned premium refunded."

Chancellor Van Koughnet, in pronouncing the judgment of the court said: "I take this receipt to contain a contract for an interim insurance, that is, till the transaction evidenced by it is rejected by the manager.... I should I think hold that by means of this receipt and the payment of the money which it acknowledges, an insurance was effected binding on the company and that it continued to be binding up to and at the time of the fire, no rejection of it having taken place in the meantime. The company, it is true, had no opportunity to reject because their agent had never informed the manager of the risk; but they, not the plaintiff, must suffer by his neglect or fraud." (39)

In another case the interim receipt read as follows:

"Received from.. .. .. ..the sum of.. .. .. ..being premium for insurance of.. .. ..as per application, for the term of one year, as described in application; and also on the conditions only therein expressed bearing date this day, subject to the approval of the Board of Directors, and to the clauses and

(38) Penley *vs* Beacon Ass. Co., 7 Gr., 130 (1859).

(39) Patterson *vs* Royal Ins. Co. (1867), 14 Gr., 169.

conditions of the policy when issued. The said party and property to be considered insured until otherwise notified either by notice mailed from the head office or by me to the insurer's address within one month from the date hereof, when, if declined, this receipt shall become void and be surrendered.

"N. B.—Should applicant not receive a policy in conformity with his application within twenty day from the date hereof, he must communicate with the Secretary direct, as after one month from this date the receipt becomes void."

Signed, R. G. HIRSCHFELDER, Agent.

The policy not being received within twenty days, the plaintiff made frequent application to the agent who told him this delay was not material, but to make all right gave him from time to time other interim receipts. Proudfoot, V. C., held that the first interim receipt was a binding contract for one year, and the N. B. clause added no additional term to what was contained in the body of the receipt. (40)

An interim receipt read as follows:

"Received from .. .. the sum of .. .. .. being the premium on the insurance to the extent of .. .. for their stock of .. .. all contained in the stone building on the south side of King Street as described in the agency order of this date; for 12 months, subject to the approval of the Board of Directors, the said party to be considered insured until the determination of the said Board of Directors be notified, and if approved of, a policy receipt and afterwards a policy will be delivered; or if declined the amount received will be refunded, less the premium for the time so insured."

The application described the goods as being contained "in a stone building covered with tin, marked No. 1 on diagram, on the south side of King Street, Hamilton, the whole as a dry goods store. See diagram on policy 1377249 expired."

On the face of the application there was written in pencil:

(40) Hawke *vs* Niagara District Mutual (1876), 23 Gr., p. 139.

"There is an opening in the east end gable through which communication is had with the adjoining house." The application was made on the 9th August, and on the 10th the plaintiffs notified the agent in writing that they had added two flats to their premises over the store next door, and that part of the stock was in the new flats. The agent subsequently fixed an increased rate which was paid by the plaintiffs; the agent, failed to inform the defendants of the notice of the 10th August. A policy was subsequently issued describing the building as in the application, and referred to the opening as it was pencilled on the application but besides describing the building as contained in the interim receipt went on to say "and marked No. 1 on the diagram of the premises endorsed on the application of the insured filed in this office as No. 10995, which is their warranty and made part thereof."

A loss having occurred, the company's contention was that by the terms of the policy they had expressly limited their liability to the goods contained in the original building, and that the increased rate was charged simply for the increased hazard arising by the cutting open of the communication between it and the adjoining house. The judgment at the trial, in favour of the plaintiffs, was appealed against, and the Court of Queen's Bench held that the policy must be construed as against the plaintiffs. The plaintiffs thereupon filed a bill in equity, praying that the policy might be amended by inserting appropriate words showing that it was intended to cover the goods in the adjoining house, which action was tried before Vice-Chancellor Blake, (21 Grant, 458), who held that the mistake was that of the agent for which his principals, the insurance Company, were liable.

The case was reheard before the full court of Chancery, where the decree below was affirmed.

On appeal to the Court of Appeal, it was held that as the policy did not cover the goods in the added flats, the Court should hold that the receipt given by the agent continued in force until the time of the fire.

Upon appeal to the Supreme Court of Canada, the Court being equally divided, the judgment of the Court below was affirmed. In his judgment Chief Justice Richards, says:

"The agent has the same power to make alterations or modifications of an insurance as he has to make an original insurance. In all cases the agent has a power subject to the control of the head office. The agent had this power of modification pending the issue of the policy..... I think it is satisfactorily shown that Hooper (the agent) had the fullest power to bind the company with regard to all preliminary matters connected with the effecting of an insurance until what he did was disapproved or affirmed by the company. Looking at the written application and the notice of the 10th of August as to the alterations in the premises and the payment of the additional premium, making the rate of plaintiffs' stock one per cent.; the giving up of the old receipt and the granting the new one on the 23rd September, though dated 9th August, I think the insurance under this receipt did cover the plaintiffs' stock in the whole of the premises, and was not confined to the part of the stock that was not in the flats that had been added."

Strong, J., says: "Assuming that the application is to be referred to for the purpose of identifying the premises, we must read that document in connection with the interim receipt and as modified, as regards the description of the premises, by the letter of the 10th August. Then collecting the agreement from these three documents, the true contract between the parties appears to me to have been precisely that which the respondents allege, and Hooper admits it to have been..... The result in my judgment is that the original agreement for insurance, evidenced by the receipt remained undetermined at the date of the loss and the respondents are entitled to enforce that contract." (41)

An interim receipt was given on a stock of goods on the 19th

(41) Wyld *vs* Liverpool and London and Globe, 33 U. C. R., 284, 21 Gr., 458, 23 Gr., 442, (1 Can. S. C. R., 604).

November 1877. The plaintiff made an assignment for the benefit of his creditors to one McKenzie on the 28th November. Fire occurred on the 15th January following, and before the policy issued. When issued, the policy was dated the 12th December. The interim receipt provided that the property should be held insured for 30 days from date or until notice be given that the proposal is declined. Holmes was the defendants' agent, and the assignee stated that he was present when the application was made for the insurance, and Holmes then knew that plaintiff had called a meeting of the creditors for the 12th November. After assignment was made McKenzie asked Holmes if it was necessary to notify the Insurance Company of the proposed assignment, to which he replied, No, as the policy was payable to the creditors on its face it was not necessary to notify the Company; that after the trust deed was drawn up he asked the agent to inform the Company and was again informed that it was unnecessary, as the policy was payable to the creditors. Defendants denied knowing anything about the assignment until after the fire.

In this case the interim receipt read as follows:

"Received from ..... of ..... $..... being the premium of an insurance to the extent of $..... on the property described in his application of this date, subject however to the approval of the Board of Directors, etc. And it is hereby declared that the property so described shall be held insured for 30 days from this date or until notice be given that the proposal is declined, but the insurance hereby made is subject to all the conditions, rules and regulations contained in and endorsed upon the printed form of policy in use by the company at the date hereof.

"N. B.—In the event of the above insurance not being completed an equivalent portion of the premium now paid will be retained for the period during which the Company has been upon the risk."

In giving judgment the Court of Queen's Bench, said: "If the assignment had been made after the policy was issued, I should

be of opinion the agent who took and forwarded the application and gave the interim receipt had not the power to assent to it on behalf of the company, without direct proof that he had the further authority to assent to such assignment.

"Had he the power to give assent to the assignment, while the application was subject to approval and the temporary insurance was in force? I think he had. His business was to take all preliminary measures and to do all precedent acts to the procuring of the policy.

"It would be the business of the agent to receive notice of the withdrawal of the application, if the applicant withdrew it, or if he made any amendment of or made any change in the nature of the property insured, or made any transfer of it, or if he became insolvent or died, because these are all matters antecedent to the issuing of a policy, and subjects properly coming within the line of duty of a person who is authorized to receive applications for a policy and to grant an insurance pending the consideration of the application."

When this case came before the Court of Appeal, the judgment was reversed, the court holding that it was immaterial whether the insurance was effected by interim receipt or by the policy subsequently issued, as in either case the contract was subject to the conditions which the statute imposed on all insurance under sec. 41, a section that declared that in case the property was alienated by sale, insolvency or otherwise, the policy should be void, unless the transfer to the assignee was approved by the Board of Directors. And inasmuch as the directors did not ratify, and in fact were never asked so to do, the subsequent insurance disentitled the plaintiff to succeed.

This case finally came to the Supreme Court, where the judgment of the Court of Appeal was reversed.

Chief Justice Ritchie, in his judgment says: "All matters connected with the transaction both before the interim receipt and after, and before the date and issue of the policy and its delivery, as a valid and binding instrument, were fully and truthfully communicated to the agent authorized by the com-

pany to effect the insurance. In fact all was done under his advice and subject to his directions. He was the party, as agent for defendants, in immediate communication with the assured and the assured through him with the defendants. I think he must be assumed to have been furnished by his principals with all necessary information to enable him to deal in a proper manner with the parties who the company, through him, sought to get to insure with them."

Mr. Justice Henry thus refers to the powers of the agent: "Some Fire Insurance companies provide against their liability through the mistake or wrongful act of any of their local agents, and the policies provide that if an application be filled up by such agent it will be deemed the act of the applicant. There is no such provision in this policy and in such a case I must look at the act of the agent here as that of his principal. He had authority over the whole subject matter up to the receipt of the premium and the granting of the interim receipt, and as I hold, he was the proper recipient of a requisite notice of any change *up to the making of the policy.*"

Mr. Justice Gwynne, after referring to the communications between a local agent and the assured, says: "Now at this time the policy had not been granted, nor was it executed for a fortnight afterwards; there can be no doubt that upon the 28th November Mr. Holmes, the respondents' local agent, to whom the application was originally made, was as such the agent of the defendants to receive information and notice of any matter which might influence the defendants in determining to grant the policy or to decline assuming the risk, as he was their local agent to receive the application in the first instance, and notice to him of the intention to execute the trust assignment and of the fact of this having been executed when executed, was notice to the respondents."

Again he says:

"The case when analysed and its facts are thoroughly understood, seems to me to be free from all difficulty, the whole point

being whether or not an agent of an insurance company authorized to receive applications for insurance and who had received such an application, is the proper person (while the application is still under the consideration of the company, who have not yet agreed to grant the policy) to whom any alteration in the subject of the insurance affecting such application and material to be communicated to enable the company to determine whether they will or not grant the policy, may be communicated, so as to affect the company with notice thereof. I cannot entertain a doubt that he is, and that he was never doubted or disputed, but on the contrary was assumed as clear law upon all sides by this court in Liverpool, London & Globe Insurance Co. *vs* Wyld, 1 S. C. R., 304." (42)

One Bourque, who desired to abandon his insurance against fire with the Manitoba Assurance Company, and in lieu thereof to effect an insurance on the same property with the Royal Ins. Company, wrote the local agent of the latter company that he desired to abandon ("je vais abandonner") his insurance in the Manitoba and asking to have a policy in the Royal in substitution therefor. The agent wrote to Bourque that if he sent $75 for the premium he would "put through the insurance for him." Bourque replied that he could not pay the amount at once, but would do so later, and in reply the agent sent him an interim receipt insuring his stock in trade, and also a blank promissory note in his, the agent's, favour for part of the premium, and a blank cheque to be signed by Bourque for the balance. Bourque signed the note and cheque and paid the same. The premium note recited the payment of the premium and declared Bourque insured for 45 days from that date, or until the policy was delivered. The interim receipt had the statutory conditions endorsed on the back thereof. Before the time mentioned in the interim receipt expired, and before the policy in the Manitoba Ass. Company had by that company been put an end to, the property was burned.

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(42) McQueen *vs* Phœnix Mutual Ins. Co., (1877), 29 U. C. C. P., 511; 4 A. R., 289; 4 Can. S. C. R., 660.

The court held that the Royal Insurance Company was liable. Mr. Justice Sedgewick, in his reasons, said as follows:

"This is a suit that, before the modern practice, would have had to be brought in a Court of Equity and the relief sought for would have been a decree directing the company to issue a policy and as ancillary to that relief to pay the amount of the loss of the plaintiff. In that case the policy directed to issue would, in my judgment, contain a declaration that the insurance thereby effected was an insurance in substitution and in consequence of the abandonment by the assured of his rights under the 'Manitoba' policy. Suppose a policy so ordered to issue contained a provision in words such as the following: 'Whereas the applicant is now insured in the "Manitoba" Company, and has declared that upon the effecting of an insurance in this company he abandons his right under the first policy; and whereas this company has agreed to such abandonment and to the issue of this policy under the circumstances aforesaid the company hereby assures, etc., etc.'; could it be contended that it nevertheless had a right to claim the 'Manitoba' policy as an existing insurance upon the property? The words 'other insurance' in the statutory conditions in that case would clearly not apply to the 'Manitoba' policy but to any other existing insurance not disclosed. It therefore seems to me the more reasonable view to hold that under all the circumstances of this case, while the 'Manitoba' Company were relieved from liability by reason of the substituted insurance, the 'Royal' Company was not relieved from its liability." (43)

PAROL CONTRACT OF INSURANCE BY LOCAL AGENT.

The plaintiff, a hardware merchant, as also a large wool buyer discounted paper with his bankers for wool purchases on the security of warehouse receipts therefor, and at the same time he signed and delivered to the defendants' local agent, who was also the bank agent, applications for insurance on the wool to

(43) Manitoba Ass. Co. *vs* Whitla, 34 Can. S. C. R., 191.

be held by the bank as further security. The agent either charged the plaintiff with the amount of the premiums in his bank account or received it in cash, but did not then fill in defendants' printed form of interim receipt, or sign a written receipt or contract of any kind professing to bind the company, stating that he was too busy to do so. He informed the head office of the insurances, but not of the mode of effecting them, and after the loss remitted the amount of the premiums and wrote out and signed receipts, copying an old printed form. There was no evidence of any express authority to the agent to enter into verbal contracts, while the applications stated that the insurances were on the usual terms and conditions of the company. One of the conditions of defendants' policy was, that no receipt or acknowledgement of insurance should be binding, unless made by and on one of defendants' printed forms, and signed by their authorized agent.

In giving judgment, Hagarty, C. J., said: "Had the local agent power to bind this company by the mere act of receiving the applications and the premiums, and verbally telling the plaintiff that he was insured?

"Little, if any, evidence was taken at the trial, as to the extent of the agent's authority. The application is for insurance on the usual terms and conditions of the company. The ordinary policy of the defendants was produced and proved.

"Condition 3 declares 'No insurance proposed to this company is to be considered in force until the payment due thereon be actually made..... The formal printed interim receipts issued from the office, and witnessed by one of the clerks or agents of the company, will alone be evidence of such payments. No receipt or acknowledgment of insurance, either new or renewal, shall be binding, unless made by and on the printed forms used by this company, and signed by the authorized agent.'

"We are told that we should regard this insurance as made without any conditions.

"We are now discussing the extent of this agent's authority to bind his principals, and we think we can certainly look at this

public declaration of the defendants as to how they as a corporation propose to deal and contract with the public.

"Mr. Kirkland was their local agent at Orangeville, and it is clear, we think, that the ordinary course of dealing was to insure always by these interim receipts, and that when communicated to the head office the company could accept or decline.

"He was furnished with a book of printed forms with counterfoils and receipts like an ordinary cheque book. In this he has in all thirty-five counterfoil entries of insurances for the defendants. All the forms of receipts are torn off therefrom.

"I do not think that the law would infer any power in the local agent of a corporation to bind them by entering into a mere verbal contract, when such agent had a clear course laid down for his guidance as to entering into a temporary and carefully guarded written contract.

"If he has the power here asked, it is not easy to see why he may not verbally enter into any arrangements he may please, whether it may vary from the terms set out in the printed forms or not.

"Although there be no statute requiring a contract of insurance (as such) to be in writing, we may well pause before holding that a corporation entrusting distant local agents with the power of effecting a temporary insurance in a specified written form, can be bound by the verbal contract of such agent, unless on some clear evidence of ratification, and a course of action sufficient to create an equitable estoppel on their disputing the contract." (44)

SECOND. EFFECT UPON THE POLICY OF MISREPRESENTATION IN APPLICATION.

We have discussed the power of the local agent in all matters connected with or arising out of the interim contract. We have now to consider the case where the interim contract is replaced by a policy of insurance, and discover how far the insured,

(44) Parsons *vs* Queen Ins. Co., 29 U. C. C. P., 188.

whose application contains misrepresentations material to the risk, may nevertheless recover in case of loss by the application of the principle of estoppel.

The liability of the company in such cases may be expressed in the following proposition and exceptions.

The Company is liable notwithstanding material misrepresentations in the application, if the answers to inquiries are incorrectly made by the applicant upon the advice, representations or promises of the agent soliciting the insurance and intrusted with the interim receipt, unless,

Exception 1.

The application clearly warns the assured that if the agent takes part in the preparation of the application he shall for that purpose be deemed solely the agent of the applicant and not of the company; or,

Exception 2

The answers to the inquiries are untrue to the knowledge of the agent and the assured; or,

Exception 3.

In provinces having no statutory conditions, the policy which subsequently issues expressly notifies the assured that for the purposes of the application, the agent will be deemed the agent of the applicant and not of the company.

The following cases illustrate the main proposition respecting the company's liability:

The applicant stated himself to be the owner, whereas the land was simply held in leasehold, although the buildings belonged to the plaintiff. Evidence was tendered to show that the defendants' agent knew about the title, which the judge refused to allow. His direction was held wrong.

Richards, C. J., says: "On the whole it seems to me that if

the buildings were owned by the plaintiff, and it is admitted they were in one sense, and he gave the answers in good faith, in that view the jury should be told that the defendants had failed to make out the plea on that point."

He closes by saying: "I rather think that the answer was truly given and that the plaintiff should have been allowed to show the true facts and the knowledge of the defendants of such facts, and that it should have been left to the jury to say whether the plaintiff communicated to the defendants or led them to believe that he had an estate in the houses, not having simply or merely an interest in them as having the absolute property in or control over them, but did as he pleased with them. In the last case he would be owner in the popular sense, and in my opinion entitled to recover; in the former case, he would not be owner, nor entitled to recover, and if he said anything which fairly led the defendants to the conclusion that he had not effected the ownership in fee, he would properly be chargeable with fraud and misrepresentation." (45)

At the time of effecting insurance, the insured erroneously stated in his application that there was only an incumbrance of $1,000, whereas there was a further incumbrance of $500.

The latter mortgage was paid during the life of the policy.

After the policy had expired and the property had received a new owner, who applied for new insurance, and told the agent the incumbrance was only $1,000, the plaintiff, at the agent's suggestion, instead of effecting a new insurance, took an assignment of the expired policy. Held, under these circumstances the defendants could not set up the misrepresentation in the original application as to incumbrances, but that it was sufficient that at the time of the plaintiff's insurance, the application was literally true. (46)

The plaintiff was an illiterate man, and unable to read or write. He informed the agent, at the time of the insurance,

(45) Hopkins *vs* Provincial Ins. Co., 18 U. C. C. P., 74.

(46) Chapman *vs* Gore District Mutual Ins. Co., 26 U. C. C. P., 89.

that though he had bought the property covered by his application he had not paid the purchase money, but had paid the interest. The agent in filling out the application inserted a statement that the plaintiff owned and occupied the buildings, that the property belonged exclusively to him, and there was no incumbrance thereon. The application which was made part of the policy contained a provision and agreement that if the applicant should make any erroneous representation, or omit to make known any fact material to the risk or if the assured were not the sole and unconditional owner of the property insured, unless the true title was therein expressed, then and in every such case the policy should be void. An application similar in character was filled out by the applicant's son at the same time and in the presence of the agent. The Court found that the Company was aware that the plaintiff was an illiterate person, and that the answers to the questions upon the application and also the signature of the plaintiff, were in the hand writing of their own agent. At this time 36 Vic., c. 44, s. 36, applied to this policy which contained an express provision that a false statement respecting the title or ownership of the applicant or the concealment of an incumbrance on the insured property or on the land on which it might be situate, should render the policy void.

The trial judge acquitted the plaintiff of any fraudulent misrepresentation, or of any false statement as to title or ownership, and found that the plaintiff did not conceal any incumbrance upon the property, and that whatever misrepresentation or concealment of facts there might have been as to the true state of the title was the act of the defendants' own agent.

Gwynne, J., held that under these circumstances, the policy could not be voided by reason merely of the terms of the clause of the Statute. He then deals with the question as to whether the policy might not be voided by reason of the terms of the policy itself, and holds that the facts above set out afforded good reason upon equitable grounds for the interposition of the court to prevent the defendants, under such circumstances from avail-

ing themselves of the defence set up in their plea. He further says that the finding of the court in favour of the plaintiff was not upon a doctrine of notice, but upon the principle of equity, that "in view of the illiterate condition of the plaintiff, and of the defendants' agent having failed to state correctly in the application the answers which the plaintiff gave, and having procured him to sign it upon the belief that his answers were correctly stated it would be a fraud in the eye of equity for the defendants to set up to the plaintiff's action, as a defence thereto, matter which may be more correctly described as the misconduct or mistake of the defendants than of the plaintiff.

"As to the second policy, he must abide the consequences of his own agent having in his name signed a document upon which the assurance was effected, containing a misrepresentation upon a point which we think sufficient to avoid the policy." (47)

An agent undertook to fill in the distances the risk stood from other buildings, and did it improperly so that the application as received by the company contained a misrepresentation material to the risk. The plaintiff's pleadings did not properly set up against the company equitable estoppel by reason of the conduct of the company's agent, but the court gave leave to have such a replication added, and gave judgment for the plaintiff. There was no limitation placed upon the agent's power in the application itself, but the policy which subsequently issued provided that "if an agent of the company fill up an application for insurance, then such agent shall be considered as acting for the applicant and not for this company, and no verbal or written statement of the agent to the contrary shall be received in evidence, *but the company will be responsible for all surveys made by their agent personally.*" A verdict was entered for the plaintiff on the findings of the jury, and after argument, a rule nisi to set aside the verdict and to enter a non suit was discharged. (48)

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(47) Chatillon *vs* Canadian Mutual, 27 U. C. C. P., 450.

(48) This case was first heard upon the demurrers as reported in 25 U. C. C. P., at p. 470, and upon the merits, in 26 U. C. C. P., at p. 380.

The case was carried to appeal, where it was held that the company was liable by reason of the provision that the "company will be responsible for all surveys made by the agent personally." On the question as to estoppel, in view of the express provision in the policy that for the purposes of the application the agent should be the agent solely of the applicant, Burton, J., said:

"The plaintiff knew that the agent's authority was limited in the manner I have indicated. If, therefore, under such a state of circumstances, he chose to employ an agent of the company to do a duty which it was incumbent upon him to transact with care and deliberation, he cannot be relieved from the consequences resulting from any negligence or want of skill on the part of the agent he has thus selected."

On appeal to the Supreme Court of Canada, the judgment of the Court of appeal was affirmed, and for the same reason, but as to the effect of the clause in the policy making the agent taking the risk the agent of the applicant, Ritchie, J., delivering the judgment of the court, said:

"Charles Morris was defendant's local agent and as such solicited risks, received applications, transmitted them, received premiums, granted interim receipts, and appears to have been and acted as defendant's agent in all particulars connected with insurance, *save only in the matter of filling up applications, when and when only, it would seem he was to be considered as acting for the assured.*"

And further on he says:

"It is, therefore, true that so far as the application is concerned, the plaintiff was contracting through *his agent* with the defendants through their agent, though one and the same person. But with respect to the survey, description and diagram the assured was dealing with Morris, not as his agent, but as the agent of the company." (49)

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(49) Shannon *vs* Hastings Mutual Fire Ins. Co., 25 U. C. C. P., 470; 26 U. C. C. P., 380; 2 A. R., 81; 2 Can. S. C R., 394.
Vide also Wilson *vs* Standard Fire, 29 U. C. C. P., 308.

It was held in Quebec following this case that a misdescription in the policy, inserted there by the agent of the company, would be deemed the fault of the company. (50)

An insurance agent prepared a diagram which did not show a coal oil shed within 100 feet of the risk, and the application failed also to show this hazard. By the variation to the statutory condition, the Company agreed to be responsible for any diagram made by the agent upon a personal inspection. The agent made no personal inspection at the time of the application. The case was tried without a jury.

The extent of the agent's authority was there, as seems to be in most cases, not well defined, and apparently only evidenced by a printed book containing instructions to agents, and a tariff.

The trial judge held that by the variation the Company assumed the responsibility for the diagram in every case where the agent undertook to prepare the diagram from data procured by himself, and therefore held the plaintiff was entitled to recover.

He also held, that the agent could not be held to be the agent of the defendant in filling up and signing the plaintiff's name in the application, and as a necessary consequence, inasmuch as defendants never professed to insure except in pursuance of a written application, the plaintiff was in this dilemma, either the application was not his application and therefore the defendants ought not to be bound by the policy, or they were his applications, and he was responsible for whatever was contained in them.

In the Divisional court, Wilson, C. J., held that the effect of the variation was only to make the Company responsible where the diagram was prepared by the agent from a personal inspection and meant that the plan which was to be the result of a personal inspection should truly represent what the agent had seen, and if it did not do so, the Company would not be liable.

Osler, J., held that the diagram which the Company agreed

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(50) Vezina *vs* Can. Fire & Marine Ins. Co., 9 Q. L. R., 65.

to accept was one which required to be the result of a personal inspection made by the agent for the purpose of the insurance, and as there was no such personal inspection, the Company were not liable. Galt, J., concurred.

This judgment was reversed in the Court of Appeal, Spragge, C. J., holding that the effect of the clause "The Company undertakes not to dispute the correctness of the diagram or plan prepared by its own officer upon his own personal inspection", was that if the agent made any mistake in the plan or diagram the Company would be responsible; that to give the clause any other meaning would make it a snare calculated to delude persons intending to insure. He also held, the knowledge of the agent was the knowledge of the Company, and that there was an estoppel in *pais,* by which the Company ought not to be admitted to show as against the insured that the diagram prepared by their agent, their accredited officer, for that purpose, was not in fact what it purported to be.

It will be noted that in this case by the very terms of the policy, the power and authority of the agent with respect to the plan of the premises is expressly given and no question arises as to the application of the rule "knowledge of the agent is the knowledge of the principal", as usually arises where the agent is acting not within the express scope of his authority, but within the apparent scope of his authority, and it is to be remembered that in Shannon *vs* Hastings, the same express powers are conferred upon the agent with respect to the preparation of the plan.

Hagarty, C. J., in this case, judge ad hoc, points out that the application did not contain my warning that the agent in preparing the papers would be considered the agent of the applicant. This only appeared in the policy, and he says: "It seems most unreasonable to hold an applicant bound by a special clause in a subsequently executed policy as to the agent being his agent in the previous preparation of the papers. He at all events ought to know it at the critical time when the knowledge might be of some use." The same case came up later on, on the question of

interest, and it was held by Spragge, C. J., that the court had no jurisdiction under the Act to allow interest. (51)

It was alleged by the plaintiff that when making the application there was a conversation between himself and the company's agent as to the amount of gunpowder which might be kept on the premises, and that the agent informed him that he understood that the company's condition allowed 25 pounds. As a matter of fact, a variation to the company's condition limited their liability for loss when more than ten pounds of gunpowder were kept on the premises without the written permission of the company. No written permission was obtained. The company, setting up the variation, denied liability. The majority of the court held, (Hagarty, C. J., dissenting,) that the variation was unreasonable in view of the conversation between the company's agent and the applicant. (52)

The error of the agent of an insurance company in preparing and transmitting to the principal office a plan of the insured property, upon which plan the buildings are designated in the policy as separated instead of being described as adjoining other buildings will not deprive the assured of his right of action on such policy. (53)

In the application for insurance it was stated that there was no incumbrance. The answers to the inquiries in the application were filled in by the company's agent. The applicant informed the agent of the existence of a mortgage on the property, and was told by the agent that if there was nothing overdue thereon, it was not an incumbrance, and under this belief the statement was made. The application did not, but the policy which issued contained a variation which provided that if any agent of the company shall have written or filled up any part of the application, he shall for that purpose be deemed the agent of the insured and not of the company; and no statement writ-

(51) Quinlan *vs* Union Fire Ins. Co. 31 U. C. C. P., 618; 8 A. R., 376.

(52) Parsons *vs* The Queen Ins. Co., 2 O. R., 45.

(53) Somers *vs* Athenaeum Ins. Soc., 7 R. J. R. Q., 104.

ten or verbal, made to such agent or canvasser as to any matter to which the inquiries in the application extend, shall bind the company or effect the company with notice thereof, unless stated in such application.

The court held, (Galt, J., dissenting,) that this condition did not prevent the company from being estopped by reason of information given to the applicant by the agent, and in any event, such a variation was not just and reasonable. (54)

An application contained a provision by which the applicant agreed that if the agent of the company signed the application for him, the agent should be the agent of the applicant and not the agent of the company. The blanks in the application were filled up by the agent, but it was signed by the plaintiff, who was not an illiterate person. To the inquiry, "Is there any incendiary danger threatened or apprehended?" the applicant answered "No." At the trial he admitted that he effected the insurance having learned that the owner of the building in which the insured property was contained, had placed a high insurance on it, and on the adjacent dwelling-house, and became alarmed because he apprehended danger. The plaintiff at the trial did not pretend that he had had any conversation with the agent as to his apprehension of the danger, and the court held, affirming the judgment below, which dismissed the action, that the plaintiff could not succeed, but intimated that a different conclusion might have been come to if the evidence disclosed that the plaintiff had stated to the agent his reason for effecting the insurance, and the agent had told him that his apprehension was groundless and had convinced him that it was so. (55)

An application was written by the company's agent who told the insured that he had seen the buildings and would make a plan to accompany the application. The insurance policy described the goods insured as stock consisting of dry goods, etc., "while contained in that one and a half story frame building

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(54) Graham *vs* Ontario Mutual Ins. Co., 14 O. R., 358.

(55) Kniseley *vs* British America Ass. Co., 32 O. R., 376.

occupied as a store house, said building shown on plan on back of application as feed house."

The evidence showed that the diagram on the plan marked "feed house" was erroneous, and that this particular building contained none of the goods, and did not fill the description of the building as a one and a half story frame building, but that another building on the plan answered this description. It was held that this misdescription was a proper one for the application of the maxim *falsa demonstratio non nocet.* In giving judgment it was said:

Per Ritchie, C. J.:

"I cannot look upon a party who goes round for the purpose of obtaining an insurance in any other way than as acting for the Company, and I cannot see how the Company is free from liability for his acts, where, as in this case he undertakes to put in with the application a plan of the building, and it was necessary that this plan should be inquired into."

Per Strong, J.:

"As regards misrepresentation I do not think that the plan and the application are to be looked upon as emanating from the insured, but must be regarded as emanating from the Company. Murray was really an officer of the Company, and what he did, unless the contrary is clearly shown, was the act of the Company."

Per Patterson, J.:

"Murray was an agent for the Company, and there is nothing in the case to show that he was an agent of the insured." (56)

In pronouncing a judgment the Court of Review gave the following *considérants*:

"Considering that the defendants conduct their business, as insurers, at Inverness (where plaintiff's property is situated), through and by means of an agent resident there, to whom they

(56) Guardian *vs* Connely, 20 Can. S. C. R., 208.

entrust the duty of soliciting and taking risks, receiving premiums of insurance, granting interim receipts, receiving from the defendants the policies of insurance, registering them in a book furnished to him, by them, for that purpose, and issuing them to the insured;

"Considering that, when applying for his insurance, the plaintiff informed the defendants' said agent, that he was then about to leave, to reside in the United States, and that his dwelling-house would be left uninhabited, but in charge of his neighbour Etienne Roberge

"Considering that, with full knowledge of these facts, said defendants' said agent accepted the risk, and granted the plaintiff an interim receipt for the premium of insurance thereon;

"Considering that, when the plaintiff actually left the premises, for the United States, he informed the defendants' said agent thereof, by letter, as also of the fact that he had left the said Etienne Roberge in charge of the property;

"Considering that this occurred, prior to the issue by the defendants of this policy of insurance, and that, when they issued it, they and their said agent were so well aware of the plaintiff's absence that they transmitted said policy, not to him, but to his nephew, and the plaintiff never, in fact, saw the policy until after the occurrence of the loss;

"Considering that the defendants are bound, by the said notice, given to their agent, and, by reason of their acceptance of the premiums of insurance, and their issue of their policy of insurance, with notice and knowledge, as aforesaid, of the fact of plaintiff's absence, they are estopped from now urging such fact, in order to defeat the plaintiff's claim against them, for the loss under said policy and said policy must be treated as a policy on an inhabited house, which in the intent of the parties, at the time of its issue, it really was;

"Considering that the refusal of the defendants to recognize or entertain in any manner the plaintiff's claim, for his loss, was a waiver on their part of their right to demand from him the details of such claim prior to his bringing suit."

This judgment of the Court of Review was unanimously affirmed by the Court of King's Bench. (57)

The plaintiffs applied for insurance to the company's agent on certain box machines manufactured in the United States and of which they were the lessees, and verbally communicated to the agent the nature of their interest in the machines. The agent prepared an application and signed it in the name of the plaintiffs, but nothing was said in it as to the ownership of the property. The agent granted an interim receipt for twelve months, subject to the approval of the head office and the conditions of the company's policy, with a clause at the foot thereof stating, "unless previously cancelled, this receipt binds the company for thirty days from the date hereof and no longer, after which time the risk shall be considered to be cancelled and of no effect. If the insurance be declined, the amount received will be refunded less the premium for the time insured, if confirmed, the policy will be issued in due course." The policy that issued described the subject matter of insurance as being held by the assured as owners. The defence to the action was the 10th statutory condition which provided that "the company is not liable for the losses following, that is to say: (a) for loss on property owned by any other party than assured, unless the interest of the assured is stated in or upon the policy."

Meredith, C. J., said: "The appellants had notice through their agents of the real interest of the respondents in the property insured, and it was, I think, therefore, their duty to have endorsed on the policy the necessary statement as to it, or at all events they are estopped from setting up the 10th condition to defeat the respondents' claim." (58)

The answers to the printed questions were filled in by the insurance agent though signed by the insured, while the description and diagram of the premises on the back of the application were not only made by the agent, but were not authenticated

(57) Watertown Ass. Co. *vs* Ansley, 17 R. L., 108.
(58) Davidson *vs* Waterloo Mutual Fire Ins. Co., 9 O. L. R., 394.

in any way by the applicant, nor in any way referred to in the body of the application. But the application did provide that for the purposes thereof, the agent soliciting the insurance should be considered the agent of the applicant and not of the company. The court held that it was evident from the plan and diagram that it was intended exclusively for the agent's own report, and that the company was liable by reason of the misrepresentation made by its own agent in filling out the diagram, following Shannon *vs* Hastings Mutual Ins. Co., supra, pp. 2, 23, 227, 273, 274, 276. (59)

UNITED STATES DECISIONS.

The decisions of the Supreme Court of the United States are in entire accord with our main propositions.

In considering the weight to be attached to judicial decisions of the Courts in the United States, it becomes important to appreciate the fact that the Supreme Court in each State does not consider itself bound by any judicial decision of the Supreme Court of any other State, nor of the Supreme Court of the United States. This accounts for the lack of harmony we find between the decisions of the Courts of the different States upon practically the same condition of facts. It is often difficult, therefore, to enunciate a proposition of law relating to fire insurance contracts which obtains the support of all the appellate tribunals. On the contrary, we find that scarcely any general principle of law can be laid down with respect to the liability of insurance corporations for which authority to the contrary effect cannot be found.

As the Supreme Court of the United States only has an appellate jurisdiction from the circuit and district courts, and not from State courts, except where "a Federal question", that is cases arising under the federal constitution, laws or treaties has been drawn in question, and its authority denied or evaded, we find the same lack of harmony between the decisions of the

(59) Mutual Fire Ins. Co. *vs* Mercier, Q. R., 14 K. B., 227.

highest judicial tribunal in the United States, and the highest appellate courts in some of the States, and this conflict directly arises in the matter now under consideration, viz: the law of agency as applied in cases of insurance contracts.

The powers of the agent of an insurance company are stated by the Supreme Court of the United States as follows: "If, however, we suppose the party making the insurance to have been an individual, and to have been present when the application was signed, and soliciting the assured to make the contract of insurance, and that the insurer himself wrote out all these representations, and was told by the plaintiff and his wife that they knew nothing at all of this particular subject of inquiry, and that they refused to make any statement about it, and yet knowing all this, wrote the representation to suit himself, it is equally clear that for the insurer to insist that the policy is void because it contains this statement, would be an act of bad faith and of the grossest injustice and dishonesty. And the reason for this is that the representation was not the statement of the plaintiff, and that the defendant knew it was not when he made the contract; and that it was made by the defendant, who procured the plaintiff's signature thereto.

"It is in precisely such cases as this that courts of law in modern times have introduced the doctrine of equitable estoppels, or, as it is sometimes called, estoppels *in pais*. The principle is that where one party has by his representations or his conduct induced the other party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert, he would not in a court of justice be permitted to avail himself of that advantage. And although the cases to which this principle is to be applied are not as well defined as could be wished, the general doctrine is well understood and is applied by courts of law as well as equity where the technical advantage thus obtained is set up and relied on to defeat the ends of justice or establish a dishonest claim.....

"On the other hand, it is well known, so well that no court would be justified in shutting its eyes to it, that insurance com-

panies organized under the laws of one State, and having in that State their principal business office, send these agents all over the land, with directions to solicit and procure applications for policies, furnishing them with printed arguments in favour of the value and necessity of life insurance and of the special advantages of the corporation which the agent represents. They pay these agents large commissions on the premiums thus obtained, and the policies are delivered at their hands to the assured. The agents are stimulated by letters and instructions to activity in procuring contracts, and the party who is in this manner induced to take out a policy, rarely sees or knows anything about the company or its officers by whom it is issued, but looks to and relies upon the agent who has persuaded him to effect insurance as the full and complete representative of the company, in all that is said or done in making the contract. Has he not a right to so regard him? It is quite true that the reports of judicial decisions are filled with the efforts of these companies, by their counsel, to establish the doctrine that they can do all this and yet limit their responsibility for the acts of these agents to the simple receipt of the premium and delivery of the policy, the argument being that, as to all other acts of the agent, he is the agent of the assured. This proposition is not without support in some of the earlier decisions on the subject; and, at a time when insurance companies waited for parties to come to them to seek assurance, or to forward applications on their own motion, the doctrine had a reasonable foundation to rest upon. But to apply such a doctrine, in its full force to the system of selling policies through agents, which we have described, would be a snare and a delusion, leading, as it has done in numerous instances, to the grossest frauds, of which the insurance corporations receive the benefits, and the parties supposing themselves insured are the victims. The tendency of the modern decisions in this country is steadily in the opposite direction. The powers of the agent are, *primâ facie,* co-extensive with the business intrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals. An insurance company, es-

tablishing a local agency, must be held responsible to the parties with whom they transact business for the acts and declarations of the agent, within the scope of his employment, as if they proceeded from the principal." (60)

Where an answer to a question in the application is given in good faith, and the question is ambiguous, the question and answer will be construed so far as possible favourably to the applicant.

In the case of an insurance upon the contents of certain buildings, certain questions and answers were contained in the application. Dealing with the rights of the parties, Hagarty, C. J., said:

"Question 24. Under what title is the property held? Answer. By deed.

"I think, in common fairness to the assured, we should intend this to relate not to the realty, but to the subject matter of the insurance—the property insured.

"The next preceding question is: What other insurance (if any) on the same property? Answer. On hay and grain, $600; on barn, $1,200.

"Now, then, the words 'same property', must, I think, mean the property insured, and the possible fact that an insurance existed on his dwelling-house could never be held to be a false statement or concealment. The whole list of printed questions and answers shews what is and what is not the subject of insurance."

And Gwynne, J., says: "If the defendants, when insuring chattel property only, desire to be informed as to the condition of the title of the realty, where the chattel property is situate, as a condition of insuring the chattel property, they must frame their questions less ambiguously, and in such a manner as not to entrap applicants for insurance into a forfeiture of the policy which they were endeavouring to effect. The defendants having

(60) Insurance Co. *vs* Wilkinson, 13 Wall., 222.

abandoned all objection to the mode of determining the amount of the damages for which the verdict was rendered, the plaintiff will retain his verdict for the full amount." (61)

In another case, Mowat, V. C., said: "The 15th interrogatory in the form of application required the appliacnt to 'state *fully* the applicants's interest in the property, whether owner, mortgagee, lessee, etc.' The applicant's answer to this was 'owner.' He had contracted for the purchase of the lot on the 13th of March, 1863, the lot being then vacant; had paid $350 on account of the purchase money; there was a balance of purchase money still unpaid; and I assume that no conveyance had been executed. The answer, therefore, takes the objection that, except as to $400 or $420, the applicant had no insurable interest in the premises when he made his application. But a purchaser, though he has not paid his purchase money, is recognized as having an insurable interest to the full extent of the value of the buildings. The answer does not suggest any misrepresentation on this point, as a bar to relief.

"The 16th interrogatory was: 'If encumbered, state to what amount?' To this the applicant's written answer was: 'Mortgaged to Building Society for $1,500.' The fact is, no such mortgage had been given. The Society had agreed to make a loan on the property; a mortgage for the sum named was contemplated at the time of the insurance; and with a view to it the insurance was effected and the premium paid by the Society. The company's agent knew the facts, and it was because the mortgage was considered to be 'as good as effected,' that the written answer was expressed as it was. It is not alleged that the unpaid balance of the purchase money exceeded, or amounted to $1,500; and I presume that if the loan transaction had been completed, the Society would have required the balance of the purchase money to be paid out of the loan. The applicant thus omitted to state one incumbrance, and mentioned another which did not exist and for a larger amount, but with no intention, so far as I can make out, of misrepresenting the real facts.

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(61) Ashford *vs* Victoria Mutual Ins. Co., 20 U. C. C. P., 434.

"Under these circumstances, I do not think the defect in the answer to the 15th interrogatory, or the inaccuracy of the answer to the 16th interrogatory, invalidates the insurance.

"The company's answer objects that the application represented the building as a new house built of wood, and in good condition; while the truth was, that it was unfinished; that it was lathed on the outside and not yet plastered; that some of the partitions, doors and windows were still wanting, and part of the flooring. But the applicant did not represent the building as finished. Some of the answers in the application shew this; and the company's agent swears that the fact was so. He expressly admits, also, that he was told that the chimneys were not yet built, or the doors hung, and that the plastering was not done. He does not recollect now any other particulars in which he was told that the building was unfinished. He did not know that the building was lathed on the outside, or that it was to be roughcast; and he thinks that, if he had known that it was lathed on the outside, and that the laths were not covered, he would not have taken the insurance. But he asked nothing as to these particulars; the interrogatories did not render necessary any statement of them; and there is no reason for supposing that the insured was aware the company would have deemed them material, or that the insured withheld the information intentionally. I think the mere non-statement does not relieve the company."(62)

In the judgment of Harrison, C. J., in another case it is said:

"The defence, if any, of the company, arises under the answer to the twelfth question contained in the application:

"That question and answer are as follows: '12. Does the property to be insured belong exclusively to you? Yes. If encumbered, state to what amount?.....' (no answer).

"The fact that the question is not only as to the exclusive ownership, but as to encumbrance, if any, we think shews that there may be an exclusive ownership, within the meaning of the question, although there be an encumbrance on the title.

(62) Laidlaw *vs* Liverpool Ins. Co., 13 Gr., 377.

"The question is in effect, 'Do you exclusively own the property, or do you own it jointly with others, and if owned by you exclusively, and not jointly by you and others, is it encumbered and to what amount?'

"The word 'owner' or the still more general words 'property belong', have no definite meaning in law, but are applicable to various interests which persons may have in property proposed to be insured: Laidlaw *vs* The Liverpool and London Ins. Co., 13 Grant, 377; Hopkins *vs* The Provincial Ins. Co., 18 C. P., 74; White *vs* The Agricultural Mutual Ins. Co., 22 C. P., 98.

"Men may properly be said to own and to be exclusive owners of the property on which they live, or which they rent to others, although such property be encumbered for some amount, much less than the real value of the property.

"To the question, therefore, put to the owner of a mortgaged property, 'Does the property exclusively belong to you?' there is nothing false in the plaintiff answering 'Yes', and especially when followed by the enquiry as to the amount of the encumbrance...

"When the explanation is, that the amount of the encumbrance was at the time mentioned by the applicant to the agent of the company who prepared the application, but that the latter either thought there was no encumbrance, that the amount was too small to be noticed, or that he was satisfied it would be soon removed, and for any of these reasons, or some other reason, he deemed it unnecessary to answer the question or report the matter to the company, there cannot be truly said to be any concealment on the part of the applicant.

"The United States decisions abundantly establish that in any such case as last supposed the company will not be allowed to avoid the policy, even where the answer was no, and the answer was false in fact." (63)

The defendants pleaded that a loan had been created by the plaintiff without their written consent as required by the pol-

(63) Sinclair *vs* Canada Mutual Fire Ins. Co., 40 U. C. C. R., 206.

icy. It appeared that the defendants' agent who took the application for insurance also obtained the loan for the plaintiff. He witnessed the assignment of the policy to the mortgagees, and sent it to the defendants' general agent, who assented to it in writing, and after the fire, the defendants paid the Loan Company $100, being the insurance on the buildings. In an action for the damage to contents, the company set up that they had never assented to the mortgage to the Loan Company.

As to this Wilson, J., in giving the judgment of the court, said: "It is too late now for the defendants to say that they did not assent to the encumbrance. They did in fact assent to the transfer of the policy, and that raises I should say an irresistible inference that they did not know some change of the property had been made by sale, mortgage, or otherwise, which would be necessary to give validity to the transfer of the policy—to the extent at any rate of the interest of the party getting the assignment in the property in question.

"The trial judge was of opinion that the sending of the money to the Loan and Agency Company by letter was a written consent to the making of the encumbrance. I say so too. The payment to the Loan and Agency Company of the $100 puts that also out of the question.

"But I go further back, and hold that the assent to the assignment of the policy may be used in evidence as a sufficient consent to some transfer of the property being made, or of its having been made so as to make the assignment of the policy operative and beneficial to the assignee of it." (64)

The trial judge found that the application was written by one J. M., at the insurance agent's request, the plaintiff concurring in that request; that M. wrote the application on behalf of the plaintiff and not as the act of the agent, and that the application for the defendants' policy was read over to the plaintiff before he signed it. The application made no reference to another insurance in the Hastings Co., the plaintiff in his evidence saying as follows:

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(64) Hazzard *vs* Canada Agricultural Ins. Co., 39 U. C. R., 419.

"When the application was read over to me I do not know that I noticed that it contained the statement that there was no other insurance on the property. I thought there was no necessity to notify the Gore company of the insurance in the Hastings. Mr. Morris said he would make the application all right with the Gore and Hastings, and I supposed he had done so. I knew it was necessary the Gore Company should know of the insurance in the Hastings Company. I thought they had been informed of it by the agent, Mr. Morris. There was no conversation between me and Mr. Morris about that; only the Gore application was read. He said they were both the same. He did not say anything about the Hastings insurance. I did not know how the question about the insurance was answered."

To the defence that there was double insurance, the plaintiff filed an equitable replication setting out that the application for insurance was filled up at the request or by and on behalf of the agent who omitted, by error or mistake, to insert or have inserted therein the existence of the insurance in the Hastings Company. The Court of Queen's Bench, (Wilson, J., dissenting,) found in favour of the plaintiff, but this judgment was reversed by the Court of Appeal. (65)

An application was for an insurance on a building of a frame waggon maker's shop and residence, and on certain articles contained therein. The questions and answers relied on by the defendants as constituting a breach of what they called a condition were:

"1. Title. State the nature of your title, whether fee simple, leasehold, or by bond or agreement. If others are interested, give name, interest and value. Answer. Owner."

"2. Incumbrance. What incumbrance, if any, is now on said property? Answer. $60. Balance of payment to be paid in four years."

The fact was that the plaintiff only had an agreement for the

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(65) Shannon *vs* Gore District Mutual Ins. Co., 40 U. C. R., 188, 2 A. R., 396.

purchase of the lands upon which the building stood, to be paid for when the vendor should come of age, three years from that date, when a deed was to be given, but the building erected thereon was constructed by the insured and was his property.

In giving judgment, Galt, J., said: "It is part of the admissions that the agent of the defendants, at the time he took the application, knew the state of the plaintiff's title. There is no question but that the plaintiff was the owner of the house, and that if on the minor coming of age he had refused to carry out the sale of the land the plaintiff might have removed it. It was his property, and he was the owner."

Gwynne, J., said: "Now in the application it does, I think, sufficiently appear, that the plaintiff's title was substantially communicated to the defendants in good faith according to the truth: viz. that he was owner of the building, and that no one had any interest therein, but that there was an incumbrance of the sixty dollars, balance of payment, to be made in four years. The plaintiff's title being admitted to have been known to the agent of the defendants, and to be substantially as stated in the application, the defendants could not expect to succeed in establishing this to be a fraudulent representation, even if their policy and plea was framed so as to enable them to raise the point." (66)

EXCEPTION 1 TO MAIN PROPOSITION.

The company is not liable where the application expressly calls the attention of the applicant to the fact that the agent, if he takes part in the preparation of the application, is the agent of the applicant and not the agent of the company.

Upon an application for insurance a mortgage was undisclosed. The application showed that the answer to the question "Is there any encumbrance?" stated "None". And opposite the question, "If any, state the amount and to whom encumbered?", there was an ink mark signifying that there was

(66) Brogan vs Manufacturers, &c. Ins. Co., 29 U. C. C. P., 414.

nothing which it was necessary to note. The plaintiff's answer to the case was that the answers were filled up by Hill, the company's agent; that he was never asked as to encumbrances; whereas Hill stated that the answer "None" was put down by him upon receiving that reply in reading over the question. In giving judgment the Court said: "It is strange.....that Hill (the agent), reading the queries one by one, should have omitted this. But supposing this query to have been omitted by Hill, would it have bettered the plaintiff's case? The proposal is signed by the plaintiff, it is his application, his statement; and Hill, while agent of the company to solicit insurance, is not therefore necessarily the agent of the company when performing a duty for the applicant for insurance; but all question upon this point seems to be removed by a provision contained in the application itself: 'The agents are considered the agents of the applicant so far as relates to the making of applications, and the delivery of all notices connected therewith, or with the insurance granted thereon, as shall be given or transmitted to him. The company will not be bound by any statements made to the agent not contained in the application.'..... It may be that this note was not read by the plaintiff; very probably it was not; for we find an unaccountable carelessness on the part of persons effecting assurances in making themselves acquainted with the terms upon which they are insuring. I do not see any omission on the part of this company in giving all necessary information to parties about to insure..... It would be almost a premium upon carelessness, and it would be most unfair to the company, with all this before the assured to make the company responsible for what passed verbally between him and Hill, even if Hill did omit the queries respecting incumbrances. There is no evidence in proof of the allegations that Hill informed the plaintiff that the answers that he had given comprised all the information that was required of him." The learned Judge then cites the 11th section of the Mutual Insurance Act, which provides that if the premises shall be encumbered the policy shall be void unless the encumbrance is ex-

pressed in the policy or the application, and says: "This provision of the statute is indeed only in affirmance of what I take to be the law without it. The existence of an incumbrance upon the assured premises is a material fact; and an applicant for insurance is bound to state to the assurers all material facts." (67)

In answer to the questions "Are the premises occupied by the owner or tenant? If by tenant give name of owner", it was answered that the owner was the applicant. Proudfoot, J., at the trial, says: "Insurance agents tell us that that is a material question in determining the risk, and whether the Company would incur it or not. I think that was a material question for the Company to know, and not being communicated I do not think they are bound by the insurance. I cannot avoid acting on those decisions that have determined that this covenant is binding on the applicant, although he may not have read the questions and may have trusted to the agent of the Company. They may have all been filled up erroneously, *yet if he choose to sign the paper stating that 'the agent of the Company is to be his agent for the purposes of the insurance', I think he must be bound by it.*"

Chancellor Spragge says: "I may add that in my opinion it is perfectly evident that it is a proper element of consideration for an insurance whether a party insuring a building is owner also of the land on which it stands."

Blake, V. C. says: "It is a matter of vital moment to an insurance Company to know exactly the interest of the person seeking insurance, as to a very large extent it must control them in accepting, rejecting or fixing the rate of insurance." (68)

In another case the 5th plea set out the first statutory condition, and then alleged that the plaintiff by his application caused the buildings to be described other than as they really were to the prejudice of the defendants, by describing the same as a "first-class building in every respect; although one roof covers all, there is a solid brick fire wall between each store or build-

(67) Bleakley *vs* Niagara District Mutual, 16 Gr. 198. (1870).
(68) Compton *vs* Mercantile, 27 Gr. 334.

ing"; whereas there was not a solid brick fire wall between each store or building; such misdescription being a fact material to the risk, and to be made known to defendants to enable them to judge of the risk; and that the policy was therefore void. An equitable replication was added at the trial to the effect that one Kay, agent of the defendants, applied to the plaintiff for a risk on the buildings and plaintiff signed an application in blank on the understanding that the agent would examine the buildings, make measurements, and fill up the application correctly; that the plaintiff never saw the application after so signing it, until after the loss, and save as aforesaid, he made no representations, and had no knowledge thereof.

At the foot of the application was printed, above the signature of the applicant "It is hereby expressly agreed, declared and warranted that each and every of the answers as above made, is true, and that the same and this application and survey, and the diagram of the premises herewith, shall be part of the insurance contract and policy hereby applied for, and shall be held to form the basis of the liabilities of the said company; and that if the agent of the company fill up the application, he will in that case be the agent of the applicant, and not the agent of the company."

No material fact was in dispute at the trial. The agent and the plaintiff agreed in their evidence. It was quite clear that the plaintiff left it wholly to the agent to fill up the application, and that the latter made an unfortunate mistake. He and the plaintiff seemed to have acted in good faith.

The 4th and 5th questions answered by the jury were as follows: 4. Did the plaintiff, by his application, erroneously and untruly represent that there was a solid brick fire-wall between each store or building? Answer. Yes.

5. Was the erroneous and untrue statement, if any, last mentioned, a statement of a fact material to the risk? Answer. Yes.

The action was tried before Harrison, C. J., who held that the plaintiff was bound by the statement in the application given to the agent to be filled up.

Hagarty, C. J., says: "I think the objection based on the Ontario Statute cannot prevail. An Insurance Company very naturally attaches great weight to the terms of the application, as it is the basis of the proposed contract, and on the information it contains must naturally depend their acceptance or rejection of the risk. They have a clear right to stipulate for a fair, intelligible description of the property, and to object to any misdescription or misstatement prejudicial to their means of forming a just judgment.

"They claim the right to hold the applicant to the correctness of the statements, and we are not prepared to find fault with their notice to him, that if he either trusts or requests their agent to fill up the application, that for such purposes he must be considered his agent, or, in substance, that by whomsoever drawn or filled up, the application must be binding on the applicant and free from material misstatement.

"This preliminary requirement seems in no way to be opposed to the spirit or the letter of the statute. It is rather in accord with its professed object.

"This case is free from many difficulties which have been presented by others, as to how a material mistake was made in the application. There is sometimes a direct contradiction between the agent and applicant as to what took place. Sometimes the latter is illiterate or stupid, and fails to understand, and a Board of Directors at a distance, who have otherwise no means of deciding in accepting or declining the risk, may fairly insist on having a statement which they may confidently adopt as binding on the applicant."

Cameron, J., concurred in the judgment of Hagarty, C. J., Armour, J., dissented, he being of the opinion that the evidence showed that the defendants did not consider the answer to these questions material to the risk, and that there should be a new trial.

The Court of Appeal deals with the question of agency as follows, per Patterson, J. A.: "Plaintiff's counsel confines himself to the question of how far the plaintiff was bound by the

acts of Kirchhoffer, the local agent, in filling up the application." He says: "His (the plaintiff's) mistake strikes me as having been in treating Kirchhoffer as the company's representative. If Kirchhoffer had reported to the company what occurred, and had explained that the plaintiff had simply signed the application, leaving the agent to ascertain for himself the particulars, which he had accordingly ascertained and now reported, the matter would have been equally free from question. The agent would have made the representation as agent of the company....

"The company issued the policy upon this application and never agreed or intended to issue one without a completed application. Kirchhoffer had no power, and was not held out by the company as having power, to agree that a policy should so issue, and he did not communicate to the company the plaintiff's desire that he should be insured without being responsible for more than the application contained when he signed it. Therefore it seems reasonable that the company should be permitted to say: You must either adopt, the application in the shape we received it and acted on it, or treat it and the policy issued upon it as null."

Burton, J. A., in concluding, remarks: "A notice of the limitation of the agent's authority, and a warning to intending insurers to fill up the applications themselves, or satisfy themselves of their correctness, given previous to or simultaneously with the application which is to be the basis of the proposed contract, cannot by any ingenuity be tortured into a condition of the contract itself; but even if it could be so considered, it is not an unreasonable or unjust condition, but one perfectly fair and proper. The company has a right so to limit the authority of its agents, and if done in a fair and open manner it would seem to be a proper course, both as regards their shareholders and other parties assured. What is to be regreted is, that the notice is not conveyed in so open a manner that there would be no pretence for a party saying that he had no notice of it, such as printing it across the application in ink of a totally different colour, or some such means."

Galt, J., says: "I agree with the ruling of the learned Chief

Justice at the trial, when he told the jury that if the plaintiff signed the blank application, leaving it to Mr. Kirchhoffer to fill up the answers to the questions, the plaintiff was bound by the representations so made by Mr. Kirchhoffer. I confess I cannot imagine a more ample delegation of authority than that which took place." He distinguishes the Universal Non Tariff case (69) and quotes the judgment of V. C. Malins, and remarks: "It is not urged here, and could not be, that the defendants ever instructed Mr. Kirchhoffer to make a description of the property, or that they knew anything about it until they received the application." (70)

An application stated the house was occupied as a residence. When the fire occurred it had been unoccupied for six months. There was a special condition endorsed on the policy that if a building became vacant or unoccupied, and so remained for ten days, the entire policy should be void. There was evidence to show correspondence between the plaintiff and the agent in which the latter, being informed that the house would be vacant shortly, said it made no difference. The application plainly stated that if the applicant desired to rely upon any information given by him to the agent he must have it inserted in the application in writing. The Court said "The authority of the local agent is defined by the application signed by the plaintiff. He has no power to make contracts but only to receive application. What the plaintiff in fact alleges here is that he made a contract with the agent that the insurance should continue notwithstanding that the house should become vacant. The authority of the agent to make any such contract is negatived by the limitation upon his powers to bind the Company contained in the application. In many cases it most certainly does increase the risk very materially if the dwelling should become vacant, and I can see nothing unreasonable in a Company saying that they decline to insure vacant dwellings." (71)

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(69) L. R., 19 Eq., 485.

(70) Sowden *vs* The Standard Fire Ins. Co., 44 U. C. R., 95; 5 A. R., 290.

(71) Peck *vs* The Agricultural Ins. Co. 19 O. R. 491.

A statement in an application for insurance that "if answers to the questions are made by the agent of the company, soliciting the insurance, he shall be considered for those purposes the agent of the applicant and not that of the company", must be construed strictly and cannot therefore be extended to a diagram of the premises made by the agent on the back of the application. A statement in an application that a diagram on the back of it disclosed the exact situation of the property insured, when it shewed another building as distant 30 feet instead of 23 feet, and the company charged the premium at a higher rate such as would have been charged had the distance been correctly given, is not a material misdescription sufficient to vitiate the policy. When the owner, shortly before the fire, left the house insured to work in the lumber shanties, the policy containing no special prohibition in this respect, the fact that the house was unoccupied at the time of the fire, without notice to the company, did not amount to such an alteration in the use or condition of the premises insured as would vitiate the policy. (72)

United States Decisions.

The New York Life Insce. Co. *vs* Fletcher, 117 U. S. Reports 519, is a decision which seems to be in consonance with the decisions of the highest judicial tribunals in Canada and in England, and although the circuit and district courts would be bound by this decision, and it has been followed where one of the judges of the Supreme Court of the United States sat as a member of the Circuit Court, yet in a number of instances, in his absence, the Circuit Court has been astute to discover grounds for explaining away this case, and has aimed at following the view of the Supreme Court of the State so far as possible.

In this case the agent, without the knowledge of the applicant

(72) Mutual Fire Ins. Co. of Canada *vs* Mercier, Q. R., 14 K. B. 227.

wrote down false answers to questions which, if truthfully answered, would probably have caused the risk to be declined. The applicant signed without reading the application. The application further contained a provision on its face that no statements or representations made, no information given to the persons soliciting or taking the application for the policy, should be binding on the Company, or in any manner affect its rights unless they were reduced to writing and presented at the home office in the application. In the application the applicant further warranted the truthfulness of his representations and agreed that they should form the basis of the contract. A copy of the application was attached to the policy and his attention in red ink was called conspicuously to the fact that the policy was based upon the application and if it contained any unintentional errors or omissions he should communicate with the Company. The plaintiff relied upon the case of the Insurance Company *vs* Wilkinson, 13 Wallace 222, supra, p. 285, that the Company alone were responsible for the fraud of the agent, but the Supreme Court in the luminous judgment of Mr. Justice Field, points out with great clearness the distinction between the case where the misrepresentation made by the agent arises through the negligence of the applicant, and the case where there is no such negligence on his part. He says, p. 529: "It was his (the applicant's) duty to read the application he signed. He knew that upon it the policy would be issued, if issued at all. It would introduce great uncertainty in all business transactions, if a party making written proposals for a contract, with representations to induce its execution, should be allowed to show, after it had been obtained, that he did not know the contents of his proposals, and to enforce it, notwithstanding their falsity as to matters essential to its obligation and validity. Contracts could not be made, or business fairly conducted, if such a rule should prevail; and there is no reason why it should be applied merely to contracts of insurance. There is nothing in their nature which distinguishes them in this particular from others. But here the right is asserted to prove not only that the

assured did not make the statements contained in his answers, but that he never read the application, and to recover upon a contract obtained by representations admitted to be false, just as though they were true. If he had read even the printed lines of his application, he would have seen that it stipulated that the rights of the company could in no respect be affected by his verbal statements, or by those of its agents, unless the same were reduced to writing and forwarded with his application to the home office. The company, like any other principal, could limit the authority of its agents, and thus bind all parties dealing with them with knowledge of the limitation. It must be presumed that he read the application, and was cognizant of the limitations therein expressed."

p. 531: "The present case is very different from Insurance Company *vs* Wilkinson, 13 Wall. 222, and from Insurance Company *vs* Mahone, 21 Wall. 152. In neither of these cases was any limitation upon the power of the agent brought to the notice of the assured. Reference was made to the interested and officious zeal of insurance agents to procure contracts, and to the fact that parties who were induced to take out policies rarely knew anything concerning the company or its officers, but relied upon the agent who had persuaded them to effect insurance, 'as the full and complete representative of the company in all that is said or done in making the contract', and the court held that the powers of the agent are *primâ facie* coextensive with the business entrusted to his care, and would not be narrowed by limitations not communicated to the person with whom he dealt. Where such agents, not limited in their authority, undertake to prepare applications and take down answers, they will be deemed as acting for the companies. In such cases it may well be held that the description of the risk, though nominally proceeding from the assured, should be regarded as the act of the company. Nothing in these views has any bearing upon the present case. Here the power of the agent was limited, and notice of such limitation given by being embodied in the application, which the assured was required to make and sign, and which, as we have

stated, he must be presumed to have read. He is, therefore, bound by its statements." (73)

The Fletcher case was more recently discussed by Mr. Justice Harlan, of the Supreme Court of the United States in Maier *vs* Fidelity Mutual Ins. Co., 78 Fed. Reporter, 566, where he says:

"But it is contended by the plaintiff that the falsity of these statements cannot be attributed to the assured, so as to render the policy void, because the answers to the questions propounded to him were in fact prepared by the agent of the insurance company, and that the company is estopped to deny the validity of the policy, upon the grounds stated, if its agent knew the facts and suppressed them when preparing the answers, or failed, fraudulently or negligently, having an opportunity to do so, to bring out the facts called for by the questions embodied in the application.

"We cannot accept this view of the contract between the parties. If the assured authorized the soliciting agent to prepare his answers to the questions propounded, and thereafter signed the application so prepared, neither he nor any one claiming the benefit of the policy ought to be heard to say that he did not read the answers, or know their contents before signing the application. His attestation of the application by his signature was a representation to the company that the answers were true: for, by the terms of his application, he stipulated that the statements made in answer to questions, 'by whomsoever written', were material to the risk, and warranted to be true, and, if any concealments or untrue statements or answers were made, the policy, as well as the contract evidenced by it, should be ipso facto null and void. And when the accused accepted a policy declaring upon its face that it was issued in consideration of the application made part of the policy, and subject to the conditions indorsed on the policy, the contract became complete, and its

(73) This decision was approved in Biggar *vs* Rock Life Ass. Co., 1902, 1 K. B., 516.

terms are to be respected, and cannot, in an action on the policy, be ignored or made of no effect. It is an essential fact in the case that in the body of the contract evidenced by the policy are found recitals which made the application, as well as the conditions indorsed on the policy, part of the contract of insurance.

"It was said in argument that the company should not be permitted to take advantage of the misconduct or wrong of its own agent. But the law did not prohibit the company from taking such precautions as were reasonable and necessary to protect itself against the frauds or negligence of its agents. If the printed application used by it had not informed the applicant that he was to be responsible for the truth of his answers to questions, and if the want of truth in such answers were wholly due to the negligence, ignorance, or fraud of the soliciting agent, a different question would be presented. But here the accused was distinctly notified by the application that he was to be held as warranting the truth of his statements, 'by whomsoever written'. Such was the contract between the parties, and there is no reason in law or in public policy why its terms should not be respected and enforced in an action on the written contract. It is the impression with some that the courts may, in their discretion, relieve parties from the obligations of their contracts, whenever it can be seen that they have acted heedlessly or carelessly in making them. But it is too often forgotten that in giving relief, under such circumstances, to one party, the courts make and enforce a contract which the other party did not make or intend to make. As the assured stipulated that his statements, which were the foundation of the application, were true, by whomsoever such statements were written, and as the contract of insurance was consummated on that basis, the court cannot, in an action upon the contract, disregard the express agreement between the parties, and hold the company liable, if the statements of the assured—at least those touching matters material to the risk—are found to be untrue.

"It is a mistake to suppose that any different views are ex-

pressed in Insurance Co. *vs* Chamberlain, 132 U. S., 304. That case turned upon its special facts, and the decision was controlled by a statute of Iowa, one section of which provided that: 'Any person who shall hereafter solicit insurance, or procure applications therefor, shall be held to be the soliciting agent of the insurance company, or association, issuing a policy on such application, or on a renewal thereof, anything in the application or the policy to the contrary notwithstanding.' "

In a recent case in Quebec it was held, following Biggar *vs* Rock Life Ass. Co., 1902, 1 K. B., 516, that the assured who signs an application prepared or written by the agent of the insurer, makes the latter his own agent for the purposes of such application. (74)

DECISIONS CONTRA.

There are three cases in Ontario in which the opposite view is expressed, and following certain American decisions, the Canadian courts have held that the company would still be liable notwithstanding that the attention of the insured was called to the fact that, as regards the application, the soliciting agent would be deemed to be the agent of the applicant and not of the company. It is submitted that these cases were wrongly decided, and that the weight of authority is entirely the other way. If the liability of the company, where the agent exceeds his mandate or authority, is, as we have ventured to contend above, dependent entirely upon the principle of estoppel, it would follow that where the agent has no authority to bind the principal, and the attention of the insured is expressly called to that fact, and he knows or must be deemed to know, from the information brought directly to his attention, that he cannot rely upon any information, advice or representation made by the agent, he has no ground to claim a relief from the court on the ground of estoppel by misrepresentation.

(74) Lamothe *vs* North American Life Ass. Co., Q. R., 16 K. B., 178; 39 Can. S. C. R., 323.

The cases above mentioned were as follows:

A policy was upon four buildings. The application provided that: "The applicant is requested to answer the above questions fully, as it is expressly agreed on the part of the applicant that the survey as well as the diagram of the premises shall form a part and be a condition of this insurance contract. It is further agreed that if the agent of the Company fills up the application he will in that case be the agent of the applicant and not the agent of the Company." It appeared that there was a blacksmith's shop 86 feet from the building, which was not disclosed, although the application contained an inquiry "What is the distance, occupation, and materials of all buildings within one hundred feet?" The evidence showed that the defendant's agent filled up the application; that he knew of the blacksmith's shop and that in response to an inquiry of the plaintiff, the agent said the building need not be shown in the application. The plaintiff filled up the answers to the questions, although the agent made a survey of the premises, and a plan which the plaintiff copied on the application. Plaintiff signed the application as agent for his wife, and also signed the name of the agent at the agent's request. The case was tried before Mr. Justice Galt, who made use of the following language: "With regard to the misdescription of the property, it is very much to be desired that there should be some decision to which we shall all bow. As at present advised I am of opinion that the party sending forward the application assumes the correctness of it, and that the company are entitled to treat the representation made by him as correct. Consequently, if there are buildings within the prescribed distance, I think the company are not bound by any representation the person professing to act as their agent may have made. I think the defendants are entitled to a verdict on that ground."

In the full Court, Harrison, C. J., in his judgment, says: "There is nothing to prevent a fire insurance company relying for its information, as to the proposed risk, solely on a written application to be made for the insurance, but if instead of doing

so, the company appoints an agent to solicit risks, it is impossible for the company wholly to escape a responsibility for the knowledge acquired by such agent in the course of his employment in the particular transaction, afterwards the subject of litigation." And cites a number of cases in support of that proposition, mainly American; and proceeds further to say: "Besides, insurance companies ought not, if possible, to be allowed to repudiate all responsibility for the acts of their agents when giving information and advice as to what is necessary or not necessary to be contained in the application for insurance", and cites further American authorities to support this proposition. Later on he says: "The defendants now seek to defeat the plaintiff's claim because the plaintiff's agent, acting under the instructions of the defendant's agent, omitted the blacksmith's shop from the application for insurance. Such a defence is, on the facts, revolting to every principle of fair dealing, considered as between man and man. Law is said to be the perfection of reason; but if law admitted this defence on the facts to prevail, it would, in my opinion, be the perfection of iniquity."

He also says that by the questions endorsed on the application, the agent was required to be particular in stating how adjacent buildings are occupied, etc., and it was therefore obvious that the company did not mean to rest solely on the application of the insured but as well on the survey made by their own agent. He points out also that the defence is not rested on the ground of breach of warranty, but even if it were, he would hold that it was inequitable "for defendants to set up the act of their own agent for the purpose, after a fire, of defeating their own policy, and that they ought not, on the facts proved at the trial, to be allowed to do so."

Armour, J., in referring to the portion of the application which made the agent, if he filled up the application, the agent of the applicant, refuses to hold that that covers instructions given by the agent to the applicant with respect to the manner of filling out the application.

Wilson, J., held that "the obligation to state what buildings

were within the 100 feet was a part of the contract, and is not to be treated as a mere collateral representation; and the materiality of the fact as bearing upon the risk has nothing to do with the question." And that if the defendants had put their defence upon that ground they must have succeeded. With respect to the responsibility of the company for the representations of the agent, he says: "In the first place the application provides expressly that although the defendants' agent fill up the application, he shall for such purpose be held to be the agent of the applicant and not of the company.

"That is surely express notice that he is not the agent of the company for that purpose."

He also says: "If there had been an enquiry what mortgages there were on the place, it would certainly be a wrongful concealment in law if the applicant filled up and sent to the insurers a document saying there were no mortgages upon it, when there was one; and it would be no excuse for him to say that he answered as he did because the company's agent said it was of no consequence how he answered it." He distinguishes the Universal Non-Tariff Fire Ins. Co. *vs* Forbes, L. R., 19 Eq., 485, inasmuch as in that case the applicants had nothing to do with the application. It was drawn by the company's agent after an inspection he made of the premises; the insured told him nothing. He drew it up solely from his own inspection and the statements there were not made a warranty. He proceeds further to say: "We are embarrassed by our desire to do what we would like to do between the parties in the face of a very strict bargain, and against what we may think to be a not very fair defence. But our duty is to decide even in such cases according to the contract which the parties have made. To do otherwise is to do, so far as we are concerned, an injustice, which is not excused and is not allowable because we may be able to say we have done what is fair and equitable in the cause." (75)

In the second case it appeared that the application for insur-

(75) Benson *vs* Ottawa Agricultural Ins. Co., 42 U. C. R., 282.

ance was filled up by the defendants' authorised agent for soliciting risks. The property in question consisted of eleven lots, covered by a mortgage of $1,000, there being an arrangement by which any lot would be released of the mortgage on the payment of $100. Before the plaintiff insured, he paid $300 on account of the mortgage, and was entitled to release three lots. He intended to have released the lot on which the house insured was situate, but did not do so. He swore that at the time of the filling up of the application he told the agent all about the mortgage and the latter said it was not worth mentioning in the application. The application provided that if the agent filled up the application he would be the agent of the applicant and not of the company, and also contained an agreement by the applicant that the survey and diagram shall be a part and condition of the contract.

Chief Justice Harrison, delivering the judgment of the Court, says: "This disclaimer is, according to Phillips, on Insurance, often disregarded by the Courts of the United States, and has been made the subject of express legislation. The difficulty, if any, which we feel in this case arises from the fact that the Courts in this Province have not as yet gone so far on the path of justice as most of the Courts of the United States." He further says: "In some recent cases in this Province notwithstanding the use of words similar to those at the foot of the application in this case, insurance companies have been held bound by the knowledge of the agent to solicit risks acquired in the course of his business, or rather prevented from setting up their own ignorance of their agent's knowledge acquired in the course of his agency, notwithstanding he omitted to communicate it." And cites among others, Wyld *vs* London, Liverpool & Globe, (76) and points out that in this case the application did not, as in other cases, provide "that the company would not be bound by any statement made to the agent not contained in the application", and "We may therefore decide in favour of the

(76) 1 Can. S. C. R., 604.

plaintiff so far as the mortgage is concerned, without overruling or in any manner interfering with either of these cases." (Johnstone *vs* Niagara District Mutual, 13 C. P., 331; and Bleakley *vs* Niagara District Mutual, 16 Grant, 198).

He also points out that the instructions proven to have been given to the agent to cancel the policy if from cause the risk had become hazardous, was evidence of the larger powers held by the agent. (77)

In the third case it appeared that during a conversation which occurred on the signing of the application, the plaintiff stated that there was a stove on board the boat, which was being insured, but there would be no one living on board during the winter, and there would be no fire in it until the ship was fitted up in the spring, and the plaintiff asked if he could then light a fire in it to which the agent replied "Certainly, no sane man would suppose you were not to put a fire in the stove that was necessary at such a time." The defendants pleaded the non-disclosure of the stove and the use of fire as material facts to be known, but which were concealed, and therefore the policy was voided. The application contained the usual clause with respect to the agent being the agent of the company and not the agent of the applicant, and contained a warranty as to the truthfulness of the facts contained in the application, so far as known to the applicant. The application further stated that no fire was used in the steamer and that there were no stoves, funnels, flues, &c., for heating.

The case was tried before Armour, J., and a jury. The jury found that the plaintiff had made a just and full and true exposition of all the facts relating to the risk, as far as the same were known to him and material to the risk.

Chief Justice Hagarty, says: "It is not necessary to examine very critically the precise limits of this agent's authority, as no evidence was given to define or limit it, and in that respect the

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(77) Naughter *vs* Ottawa Agricultural Ins. Co., 43 U. C. R., 121.

case is less embarrassed with difficulty than many others with which we have had to deal.

"It is true that the application provides that if he fill up the application he shall be the agent of the applicant, not of the company; but we do not understand that we are therefore to ignore all that passed between him and the applicant. We may resort to it, we think, to explain doubtful expressions, and to ascertain the sense in which they were understood." The Chief Justice held that in view of the statements made by the agent and the ambiguous form of the questions and answers, they could be construed so as to uphold the policy. And he concludes his judgment by saying:

"To those unacquainted with legal decisions and distinctions, it must always appear opposed to the ordinary intelligence of mankind that companies can make contracts by means of agents, accept all the benefits derivable therefrom, and at the same time repudiate every representation made by such agents, and insist that words and expressions proved by the testimony both of the agent and the assured to have been used and understood in one sense as to be read in a different sense; that matters possibly material to the proposed risk fully communicated to the agent, and by his mistake, or by his direction, not noticed in the application, should avoid the insurance, to the possible ruin of a man whose only fault was to trust in the person employed to induce him to enter into the contract." (78)

It will be noted that the judgment in Sowden *vs* Standard, (79) in the Court of Appeal, was pronounced subsequent to the adoption by the Legislature of Ontario of the Fire Insurance Policy Act, and subsequent to the three cases last above mentioned, in which an opposite opinion was expressed as to the liability of the company where the notice of the limitation upon the agent's authority was expressly brought home to the assured at the time of the application.

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(78) Lyon *vs* Stadacona Ins. Co., 44 U. C. R., 472.

(79) Supra, page 297.

EXCEPTION 2 TO MAIN PROPOSITION.

The company is not liable if the answers to the inquiries in the application are untrue to the knowledge of both the agent and the applicant.

The foundation of this exception of the law is that the conduct of the parties in truth perpetrates a fraud upon the company.

The fourth plea in an action read as follows:

"That by the said policy of insurance it was covenanted and agreed that the application of the plaintiff, upon which the said policy was granted, and the survey and diagram of the insured premises, and all things therein contained, should be taken and considered as a part and portion of the said policy, and that if the insured should therein make any erroneous representation, or omit to make known any fact material to the risk, then the said policy should be void. And the defendants say that at the time of the making of the said application, and of granting the said policy, there was a certain wooden house or building situate near to, that is to say, fifty-eight feet from the said insured premises, which was a fact material to the said risk, and to be known to the defendants, yet the plaintiff in the said application and diagram erroneously represented that the said building was situate one hundred feet from the said insured premises, whereby the said policy was and is void."

To this plea the following replication was made:

"Second replication to the defendants' fourth plea: that the insurance referred to in the pleadings herein was effected by the plaintiff with the defendants through one Charles Morris, an agent of the defendants, having authority to solicit, make out, and forward applications, to deliver policies when returned, and to collect and transmit premiums. And the plaintiff says that said agent personally inspected the property insured, and was fully aware of the position of the same, and of the distance of the said property from the said wooden house or building mentioned in the said plea; and the said application and dia-

gram was filled up with the knowledge and approbation of the said agent, and transmitted by him to the defendants, and neither they or their said agent raised any objection to the contiguity of the said wooden house or building, or notified the plaintiff that his policy was affected thereby. And the plaintiff further says that there was no fraud or fraudulent misrepresentation on his part in reference to the distance of the said wooden house or building from the property insured."

The judgments of the majority of the court, Harrison, C. J., dissenting, were delivered by Wilson and Morrison, JJ. In his judgment Wilson, J. says:

"I am not inclined to favour these companies when they are not acting, as I may think, fairly, or even liberally, but the like rule must be equally applied to the other side. The great object is to enforce the contract as both parties understood it, and honestly intended it to operate. Now the plaintiff knew the three matters complained of were made material articles of the contract, and that he must speak truly with respect to them; yet he erroneously represented two of them, and erroneously concealed the third; and his only answer to the defendants is, that their agent knew all about the facts, and the misrepresentation and concealment he, the plaintiff, was guilty of; and that the defendants must be held bound by their agent's misconduct, which he, the plaintiff, participated in, merely because he was their agent, although the defendants knew nothing of his misconduct, nor that the plaintiff was a partner in it.....

"But does an agent, with all the powers before mentioned, possess the power or right to accept and bind the company by an application false to his own and the applicant's knowledge in matters material to the risk, and to be known by the defendants? I think he does not."

Morrison, J., says: "I concur in the view taken by my brother Wilson. The facts, as they appear in the pleadings, amount to this: that in the plaintiff's application for insurance, the plaintiff erroneously represented the distance of the premises to be insured from the wooden building to be 100 feet, while in fact it

was only 58 feet, and that that fact was one material to the risk; that the plaintiff and the defendants' agent were both fully aware of the same; that the plaintiff, with such knowledge, so filled up the application; and that the agent, with the like knowledge, approved of his doing so, and transmitted the application so filled up to the defendants as the basis of the plaintiff's insurance. Can it be said that this does not shew a joint fraud on the part of the plaintiff and the defendants' agent on the latter's employers? I think so. The averment of no fraudulent misrepresentation on the part of the plaintiff does not in my opinion, help the pleadings." (80)

In a case, coming from the Province of New Brunswick, where the statutory conditions were not in force, a condition was endorsed on the policy making the application part thereof, and providing that false representations as to the condition, situation or occupancy of the property should void the policy; and also that if the interest of the assured in the property be other than the entire, unconditional and sole ownership of the property for the use and benefit of the assured, unless so expressed, should void the policy, and the application also provided that the agent filling up the blanks should be deemed the agent of the assured and not the agent of the company. To the questions in the application, "Are you the sole owner of the property to be insured?" and "Are you the owner of the land on which the above described building stands?" the insured replied "Yes." The application was signed by the insured himself, but the answers to the questions were filled in by the agent.

The fact was that the building was situate on a public highway to the knowledge both of the insured and the agent, and the agent admitted that when filling in the application he asked the insured as to this question, and he was told that the house was on the highway and that notwithstanding this he had told the applicant that he would put down in the application that the ground belonged to the applicant. In giving the judgment of the court, Sedgewick, J. says:

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(80) Shannon *vs* Gore District Mutual Fire Ins. Co., 37 U. C. R., 380.

"It does not, therefore, appear to be necessary to discuss the effect of that clause in the application which purports to make the agent where he fills up the blanks in the application the agent of the assured instead of the agent of the company. Being in collusion for the purpose of perpetrating a fraud upon the company for their joint benefit neither of them can contend that McAllister was the company's agent for that purpose." (81)

EXCEPTION 3 TO MAIN PROPOSITION.

The company is not liable in Provinces where there are no statutory conditions if the policy provides that in the preparation of the application the agent shall be deemed the agent of the assured and not of the company.

This proposition has the support of two decisions of the Supreme Court of Canada. The first is Shannon *vs* Hastings Mutual Fire Ins. Co., (82) the facts of which are cited supra, pp. 223, 273.

In the second case, as stated in the judgment of Proudfoot, J., the form of the application contained no warning to the plaintiff that the defendants' agent was his agent for the purpose of the application, but there was a condition to that effect in the policy, and it was not shown that the plaintiff knew it, and in fact he did not receive the policy until after the fire. The agent was also the agent for the Gore District Mutual Ins. Co., in which company the plaintiff had another policy of insurance, which had been mislaid, and the agent undertook to inspect the books and papers in his office to discover if the Gore District policy also covered the property then being insured in the Provincial, so as to insert it in the application. The agent neglected to do so, and gave the plaintiff an interim receipt to cover the insurance for 30 days, and sent on the application without any reference to the other insurance. The company accepted the risk and in accordance with their practice where the risk extended only over a short period, instead of a formal policy issued

(81) Norwich Union Fire Ins. Co. *vs* LeBell, 29 Can. S. C. R., 470.
(82) 2 Can. S. C. R., 394.

a certificate which stated that the plaintiff was insured subject to all the conditions of the company's policies, of which he admitted cognizance, and that in the event of loss it would be replaced by a policy. The property insured was destroyed by fire after the 30 days, but within the period covered by the certificate, and a policy was not issued until after the loss, which policy contained the provision above mentioned, that the agent should be deemed to be the agent of the applicant and not of the company.

Ritchie, C. J., in giving the judgment of the court, said:

"If Billington (the insured) chose to trust to Suter (the agent) to obtain the information for him and he failed to do so, how can this affect the company? Instead of getting himself the precise information required to enable him to make a proper application as was his interest and his duty to the company, he trusts to Suter to get it for him. Surely he must take the consequences of any neglect on Suter's part. He says 'I supposed everything was satisfactory or he would let me know. He took my money and I supposed it was all right.' In other words, he trusted Suter to do for him what he ought to have done himself, and too late discovers he has trusted to a broken reed. In all this Suter was in no way representing the company in any matter within the scope of his authority or duty. He was acting solely for Billington's accommodation." (83)

A variation to the statutory conditions by which the insurance agent is made the agent of the applicant if he prepares the application will be held unreasonable. The argument in favour of the applicant under such conditions is well expressed in the judgment of Hagarty, C. J., as follows:

"In the case before us the application does not contain (as it sometimes does) any warning that the agent is to be considered the applicant's agent in preparing the papers. This provision appears for the first time in the conditions of the policy, as a

(83) Billington *vs* Provincial Ins. Co., 3 Can. S. C. R., 182.

variation from the statutory conditions. In their instructions to their agent they declare that the agent 'must see that it is carefully filled up, and satisfy himself that the diagram on the back of it shows every exposure within the distance named. He must also answer the inquiries on the back of it, which are directly submitted to him.'

"The applicant himself or his attorney must sign it (the application) and be made to understand that he is responsible for all it contains.

"Here they adopt and act on an application on its face professing to be signed by the applicant by and through P. P. Lodge, their agent. So that they were directly cognizant of the fact that Lodge prepared the papers and diagram.

"They were willing to trust to his correctness, and accepted the risk. They now urge that the applicant should not have trusted him. They urge that the plaintiff is bound by the condition as to agency in the policy subsequently issued even if he never read it. May he have, not unreasonably, assumed, even if he read it, that they issued it with direct notice that their agent had prepared everything, and that they would be satisfied with his properly doing his duty?

"I do not dwell on the suggestion that the plaintiff had previous familiarity with insurance business. It might be used as an argument on the other side, that with such knowledge he would the more readily leave everything to be done by the agent.

"It seems most unreasonable to hold an applicant bound by a special clause in a subsequently executed policy as to the agent being his agent in the previous preparation of the papers. He, at all events, ought to know it at the critical time when the knowledge might be of some use." (84)

The view expressed by Hagarty, C. J., has been adopted by the Ontario courts in holding that a variation to the statutory conditions is not just and reasonable which provides as follows:

"If any agent or canvasser for this company shall have

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(84) Quinlan vs The Union Fire Ins. Co., 8 A. R., 376.

written or filled up any part of the application for this insurance, he shall for that purpose be the agent of the assured and not of the company; and no statement, written or verbal, made to such agent or canvasser, as to any matter to which the inquiries in the application extend, shall bind the company, or affect the company with notice thereof, unless stated in such application." (85)

THIRD. — ESTOPPEL AFTER ISSUE OF POLICY AND BEFORE LOSS.

Having considered the liability of the company in the different classes of cases which arise where there is misrepresentation in the application, we have next to consider how far the company is estopped by the conduct or representations of the local agent after the policy has issued, and before any loss has occurred.

A review of the Canadian decisions shows that although no more definite principle of law can be laid down than the general one that the company will be held liable for the conduct or representations of the agent, if, in the opinion of the court or jury, the facts warrant the conclusion that he was acting within the apparent scope of his authority, yet in very few cases has the court held the circumstances such as to create a liability on the part of the company. (86)

By the third statutory condition notice of a change material to the risk may be given to the local agent. (87)

The following cases arose when there was no statutory condition or provision that notice might be given to the agent.

NOTICE OF VACANCY.

THE COMPANY HELD LIABLE.

A condition of a policy of insurance provided that in the event of a failure to notify the company of the premises becoming

(85) Graham *vs* Ontario Mutual Ins. Co., 14 O. R., 358.

(86) Hendrickson *vs* Queen Ins. Co., infra p. 324.

(87) For decisions under the statutory condition vide infra. p. 292.

vacant or to obtain their assent thereto, the policy became void. The policy was issued to one Tutton, who sold the premises to the plaintiff and assigned the policy to him, the company assenting to the assignment, and which was endorsed on the policy. One Lodge was the local agent at Port Hope, the head quarters of the company being in Hamilton. The evidence showed that Lodge had full knowledge that the house was vacant at the time of the assignment of the policy. The plaintiff deposed that before he took the assignment he told Lodge the house was empty and to govern himself accordingly, and that Lodge said "All right Mr. Williams." Lodge admitted that he knew the house was vacant, but he would not say whether or not he had notified the head office. For the defence, the secretary of the company swore that no notice was ever received by them and that Lodge had no authority to receive notices of houses being vacant. Under these circumstances, the company were held liable, Hagarty, C. J., saying:

"The plaintiff applies to Lodge, informing him of his position, and produces to him the assignment from Tutton. Lodge is directly informed of what in fact he knew perfectly well already, that the house was then vacant. He receives from the plaintiff the fee charged by his company for recording this transfer. He sends the policy so transferred to the company, by whom it is returned with their written assent, and their receipt for the recording fee.

"Now, in all this transaction the company deal with the plaintiff through Lodge as their agent. As a corporation they can only deal by agent, and I see no agent here representing them to the plaintiff but Lodge. If he take the transfer fee, however small, from the plaintiff, and sends it to his principals, and he have the notice as to the vacancy, I think he was as much bound to communicate that notice to them as to send the fee and obtain their consent to the transfer to plaintiff.

"If we hold otherwise, then the result must be, that the plaintiff, dealing with this corporation only through Lodge, their agent, is knowingly allowed to enter into this transaction and

take an assignment of the policy, and consider himself insured, while all the time the whole thing is a void proceeding, because the agent neglects his duty to inform his principals.

"Who is to suffer for Lodge's neglect, if there were any neglect? Is it the plaintiff who never employed Lodge, or the company who did employ him?"

Gwynne, J., was of the opinion that the plaintiff should be entitled to file a replication on equitable grounds in the nature of estoppel in *pais,* setting up the facts above alleged as being a reason why it was inequitable for the defendants to set up their defence of the breach of the condition as to vacancy. (88)

Notice of Vacancy.

The company held not liable.

A fire policy, granted to the plaintiff on a dwelling-house in a town, contained the following condition: "Unoccupied dwelling-houses, with the exceptions undermentioned, are not insured by this association, nor shall it be answerable for any loss by fire which may happen to, in, or from any dwelling-house left without an occupant or person actually residing therein. The temporary absence of a member or his family, however, none of the household effects being removed, is not to be construed into non-occupancy. And this condition is not construed to apply to the temporary non-occupation of small dwellings for the accommodation of hired help on a farm, the main dwelling on the same continuing to be occupied. But the main dwelling-house must not be unoccupied for longer than forty-eight hours at any one time." The plaintiff lived several miles from the house which was leased to a monthly tenant, who had removed his goods within forty-eight hours before the fire, and no one had resided in the house for ten days before. The fire took place on the 10th September, and the tenant's month was up on the 24th. He was in arrear for rent, for which his goods had been dis-

(88) Williams *vs* Canada Farmers' Mutual Ins. Co., 27 U. C. C. P., 119.

trained, but the plaintiff, who had a person ready to take possession, did not suppose that the tenant would leave until his month was up. Held, that the exception as to forty-eight hours applied only to dwellings on a farm; that the condition which required an acutal residence of the occupant was broken; and that the plaintiff could not recover. (89)

VACANCY CASES under the statutory conditions, vide infra, pp. 401, 490.

NOTICE OF ALTERATIONS AND CHANGES TO THE RISK.

COMPANY HELD NOT LIABLE.

It was pleaded, that alterations in the buildings, of which no notice was given to the company, had materially increased the risk. To this the plaintiff replied on equitable grounds, which in effect set up that he gave verbal notice of the alterations to the agent, who was the proper person to receive the same. That the agent inspected the alterations, and approved of them, and said they did not increase the risk, and that they did not require to be notified in writing to the company; and that the agent of the company thereby waived the written notice.

The jury found the risk not increased and the equitable replication proved, and verdict was entered for the plaintiff.

Morrison, J., delivered the judgment of the court, and held that as to the equitable replication, there was no evidence to go to the jury to support the allegation that Ryal (the agent) was an authorized agent to make the agreement. He says:

"The result of this case may be hard on the plaintiff, from his being led into error by an agent of the company; but, as I have felt it to be my duty to tell jurors in several cases tried before me against this company, if the insured does not pay attention to or comply with the conditions of the policy he has

(89) Abrahams *vs* Agricultural Mutual Assurance Ass., 40 U. C. R., 175.

himself to blame, as the Company take special means to warn the insured of his duty by conspicuously printing in large coloured letters at the top of the policy, 'Be sure and read the conditions on the inside hereof, as any deviation therefrom will render the insurance void,' and by appending at the end a similar admonition in case of omitting to give any of the notices; and by printing on the back of the policy as follows: 'N. B.—Be particular in reading the within policy and its conditions, and observe that notice in writing must be given to the Secretary of all changes in the risk by alterations, erections, or otherwise.'

"The rule must be absolute to enter a non-suit." (90)

The insured became insolvent, and the plaintiff was his assignee. One of the conditions of the policy provided that the company should be notified of all changes of occupation or of vacancy, and in an action brought by the assignee there was a plea that the premises, at the time of the policy, were vacant and were afterwards occupied by the insured as a dwelling-house, and in part as an Orange Lodge, of which defendants were not notified. To this the plaintiff pleaded an equitable replication that when the policy was made, the defendants knew that the building was in the course of construction and that the insured intended to occupy it as a dwelling, and that afterwards, the insured occupied it as a dwelling-house and as an Orange Lodge, to the knowledge of the defendants, who received renewal premiums, with such knowledge, from the plaintiff, down to the time of the loss, without objection. This replication was held good. (91)

At the time of the making of the insurance in question the local agent of the defendant company who was also the local agent of another insurance company having a risk upon the property, at the request of the insured agreed to give notice to the defendants of the other insurance, but neglected so to do. The secretary and manager of the defendant company stated that the local agent had no authority to receive notices of further in-

(90) Lyndsay *vs* Niagara District Ins. Co., 28 U. C. R., 326.
(91) Dickson *vs* Provincial Ins. Co., 24 U. C. C. P., 157.

surance. It was held that the notice to the agent was not a notice to the defendant company in any form, for he had no authority to receive such notice; his duty was completed by the acceptance of the risk. He had no power to modify it or to receive anything, nor to do anything further than to accept risks and forward the applications to the head office of the company. (92)

Although not necessary for the decision of the case, Harrison, C. J., said:

"While notice to an agent in the course of his employment is generally deemed notice to his principal, the question is whether the local agent represented the company for the purposes of s. 38" (of c. 44, 36 V., the Mutual Ins. Companies Act which provided for notice of other insurance being given to the company, otherwise the policy should be void) "the better opinion would appear to be that in the absence of express authority to the local agent or of implied authority to him to be presumed by reason of his previous dealings with the knowledge of the Company, the notice of further insurance must be given to the Company themselves, or to such of their officers as have the power to exercise the option of cancelling the policy." (93)

After the insured buildings had been occupied for some time the proprietor thought proper to make certain material changes without giving the required notice to the company, although he intimated verbally in conversation with the secretary-treasurer, that certain changes were being made in the building.

It was held that this was no notice according to law. (94)

NOTICE OF OTHER INSURANCE.

THE COMPANY HELD LIABLE.

In an early case in Quebec it was held that where a notice was given to a local agent, and he made a mistake in supposing the

(92) Billington *vs* Canadian Mutual Ins. Co., 39 U. C. R., 453.

(93) McCrae *vs* Waterloo County Mutual Fire Ins. Co., 1 A. R., 218.

(94) British America Land Co. *vs* Mutual Fire Ins. Co., 18 R. J. R. Q., 168.

insurance was on stock instead of on a building, the insured should not suffer by the agent's error. (95)

One Adamson was a sub-agent of the defendants at Oil Springs, and one Poussett was agent for the entire county of Lambton, residing in Sarnia. The insured made an assignment of the policy to one Morris which was assented to by Adamson, and also by Poussett. Adamson deposed that he was consulted as to the further assignment which was made to Batchelder & Pettingell, and spoke to Campbell, the defendants' inspector as to how the assignment should be effected, and was told to use the same form on the back of the policy as in the former assignment. The house in the first instance was a temperance establishment, and Batchelder & Pettingell commenced keeping an hotel with a bar. Campbell informed the agent that the premium would have to be increased, which was done, and paid to Adamson by Batchelder. There was a receipt for the premium received from Batchelder & Pettingell endorsed on the policy by Poussett dated 5th July 1866. The premises were burned on the 13th September, 1866. The general manager at Montreal admitted that the company had received notice from Poussett in May, 1866, of the receipt by him of the extra premium to be endorsed on the policy, and that Poussett's account with the head office of July, 1866, charged himself with this extra premium. The general manager also denied that he had any notice of the assignment of the policy or that Poussett had authority to assent to the assignment. As to the additional insurance, Batchelder & Pettingell deposed that in July, 1866, they had informed Poussett that they had insured the premises in another company, that Poussett had made some reply but they did not remember what it was, while Poussett denied having any recollection of getting any information respecting the second insurance.

On these facts the Court of Queen's Bench held that there was evidence to go to the jury as to whether or not the defendants

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(95) Per Dorion, C. J., Canadian Mutual Ins. Co. *vs* Donovan, 2 L. N., 229.

assented to and accepted the assignment from Morris to Batchelder & Pettingell, but that as to the subsequent insurance, notice to the agent was not effective notice to the company.

Wilson, J., said: "I think this was a notice which, in the absence of express authority to the agent, or of implied authority to him to be presumed by reason of his previous dealings, should have been given to the company themselves, or to such of their officers as could have exercised the option of cancelling the policy and of returning the proportional part of the premium.

"It is quite manifest that every or any agent of the company cannot possess the power of cancelling the policies of the company at their mere option, however the company may do so, with or without cause, by the present condition. And it is quite manifest that every or any agent of the company cannot cancel the policies merely because there has been a further insurance effected, without regard to the reputation of the party insured, the character of the risk, amount of further insurance made, the value of the property as compared with the total insurance on it, or the nature and extent of the business relations between the company and the insured, of which the agent might know nothing, and which the cancellation of the policy might seriously prejudice.

"These are matters to be determined by the principals, and not by subordinate agents."

On appeal to the Court of Error and Appeal, the judgment of the court below was affirmed. Hagarty, C. J., says:

"I am told that we should construe these conditions strictly against, not in favour of, the underwriters. This may be so; but I think, at the same time, we must give some rational and intelligible construction to a contract like this. The plaintiff contends that it is sufficient for him to tell the company or their local agent of the fact of his having effected the new insurance; everything else must be done by them. I think the clause required something more. Notice was to be given, so that a memorandum might be endorsed of such other insurance on the policy.

otherwise it was to be void. Who was to do this? The plaintiff had the policy of insurance, or must be supposed to have it. Can it be possible that he fulfils his part of the bargain by sending a verbal message to an agent of the company, or calling out to him, if he meet him in the street, that he has effected another insurance? Is that giving notice, so that 'a memorandum of such other insurance' may be indorsed on a policy that he may have in his pocket or may be fifty miles away? I cannot accede to any such construction."

Richards C. J., Mowat and Strong, V. C., were of a contrary opinion the former holding that if such notice of other insurance was usually given to Poussett, he was the agent of the company; Mowat, V. C., stating his opinion as follows:

"There is no evidence that the officers of the company in Montreal had authority to receive such a notice, or to cancel the policy; and no evidence that the local agent had not such authority; in fact, there is no evidence what authority the company had given to any of its agents on this subject. The company itself, by the policy or otherwise, made no announcement and gave no information on the subject. Can it be said, under these circumstnces, that notice to the local agent was insufficient? It was through him (or rather his sub-agent) that the insurance had been effected; it was to him that the premiums were from time to time paid; he was the person to whom, on behalf of the company, the twelfth condition directed that the assured should give notice of loss or damage should any occur; to him the account of it was to be delivered; and he might be, and I presume usually is, the agent through whom the company acts in the various matters with which the other conditions of the policy contemplated that an agent for the company might have to do."

While Strong, V. C., was of the opinion that the notice to Poussett was sufficient. (96)

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(96) Hendrickson *vs* Queen Ins. Co., 30 U. C. R., 108; 31 U. C. R., 547.

NOTICE OF OTHER INSURANCE.

THE COMPANY HELD NOT LIABLE.

It was held by the Court of Queen's Bench in the Province of Quebec that an agent of an insurance company, whose powers were limited to receiving applications for insurance for transmission to the head office, and for the collecting of premiums, has no power to waive a condition of the policy respecting double insurance. (97)

ALTERATION OF POLICY BY LOCAL AGENT.

In this case the defendants (an accident insurance company) had its head office in London, England. Its chief office in Canada was in Montreal, of which Stancliffe was manager. The chief agency in Ontario was in Toronto, of which one Woodland was the agent, and the local agents at Hamilton were Routh and Payne. Plaintiffs made an application for insurance, the risk to commence on the 26th May, 1897. The places at which the plaintiffs were carrying on work named in the application were "Stonefield, Que., and a few men temporarily loading plant from cars to scow at Ottawa, Ontario." The application was forwarded by Routh & Payne, to Woodland at Toronto, and by him sent to the head office in Montreal. The application was accepted and the policy issued. Condition No. 10 of the policy provided "the terms and conditions of this policy are not to be changed by agents." When the policy reached Routh & Payne, they returned it to Woodland, the Toronto agent, to have an addition made to the places at which the workmen were employed, the addition being "and Napierville Junction Ry., between St. Valentin and St. Remi, Que." The policy was returned by the manager at Montreal amended as requested, and was forwarded by Woodland to Routh & Payne, and the application was also amended by adding the same words.

Shortly after Routh & Payne returned the policy to Woodland

(97) Baillie *vs* Provincial Ins. Co., 21 L. C. J., 274.

to have an alteration made as to rates. This alteration Woodland declined to consent to, and enclosed a letter to be handed to the plaintiffs stating the position taken by him. Further correspondence took place and on the 2nd July the policy was returned by Routh & Payne to Woodland requesting that the indorsement be made in accordance with the plaintiffs' desire. To this Woodland replied declining to grant the request, and saying that if this was not agreeable, the only thing the company would have to do was to cancel the policy. Further correspondence took place, including a letter from the general manager, Stancliffe, at Montreal, confirming the position taken by Woodland, and on the 12th July, Woodland wrote to Routh & Payne saying "I am afraid we will have to cancel this policy, unless our clients will accept the policy as it now stands." This was forwarded by Routh & Payne to the plaintiffs on the 13th July. On the 21st, Woodland wrote to Routh & Payne: "If these people have accepted our policy as per the conditions of my letter of the 12th instant, will you kindly let me have a cheque for the premium at once? If they have not accepted our policy, please return the same so that it can be cancelled."

Further letters were written by Woodland asking for payment of the premium, and on the 24th August, he received a cheque from Routh & Payne along with the following communication: "We have taken the liberty of adding the following words: 'and near Stonefield on the Ontario side of the Ottawa river.'" Woodland acknowledged the receipt in these words, "I am in receipt of your favour of the 24th instant, enclosing cheque for $255 in full payment of premium of Piggott & Ingles's policy, No. 396 for which I thank you."

An accident occurred at the works near Stonefield on the Ontario side of the Ottawa river, and the plaintiffs claimed that the policy covered the accident at such place.

The court held: "It is perfectly clear that the power to make any change whatever in the policy did not rest in Woodland, but was, as to Canada, vested in Stancliffe. The power of attorney from the company to him makes that clear, and it also

appears from the rate-book and manual for agents, put in at the trial, pp. 4 and 5, paragraphs 3 and 6.

"Paragraph 3 provides: 'Agents have no authority to make any change whatever in any application, policy, renewal, permit, or indorsement.'

"6. 'Agents are not permitted under any circumstances to allow any change in a policy after it is written; and they should give no advice to policy holders concerning changes in written contracts.'

"That the plaintiffs knew this, or must be taken to have known it, should, I think, be inferred from the extract from the agreements and conditions under which the policy was issued, by the course pursued in having added to the policy the Napierville Junction Railway, and by the terms of the letter of the 12th July, from Woodland to Routh & Payne, extracts from which are above set out.

"The argument on behalf of the plaintiffs amounts to this: that, although the contract was made with the company in accordance with the application, and although the company through its general manager and attorney in Canada had no notice whatever of the addition made by the local agents in Hamilton, and although the local agents had no power to make such alteration, and although Woodland, the chief agent for Ontario, had no power to make such alteration, yet because the chief agent knew that such alteration was made and did not report it to the general manager, the company must be held to have authorized the alteration and is bound by the contract as altered. I have looked in vain for any authority in the text books or cases cited for the plaintiff for such proposition." (98)

Agent insuring his own property.

The agent of an insurance company cannot, without the express sanction of his principals, grant an insurance in his own favour binding on the company. (99)

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(98) Piggott *vs* Employers Liability Co., 31 O. R., 666

(99) White *vs* Lancashire Ins. Co., 27 Gr. 61.

NOTICE TO AN INSURANCE BROKER NOT NOTICE TO THE COMPANY.

One of the conditions of the policy declared that it should be void in case any other insurance was made on the property, unless notice thereof was given to the company. The business of an insurance company was managed by an agent residing in St. John, to whom applications for insurance in other parts of the province were made through brokers.

Held, per Ritchie, J., that the notice of the prior insurance to an insurance broker is not notice to the company. (100)

AN INSURANCE BROKER ACTING AS AGENT FOR DIFFERENT COMPANIES HAS NO IMPLIED AUTHORITY TO CANCEL POLICIES.

In an action on a promissory note given for a premium of insurance, the defence was that after the note had been given, there being some dispute as to the valuation of the ship, the brokers agreed to cancel the policy. The court held that the agent of a foreign company who received applications for insurance and forwarded them to the company, who collected premiums and received and delivered policies and settled and paid losses, was not authorized to cancel policies issued by the company. (101)

LIABILITY OF LOCAL AGENT TO THE INSURED FOR NEGLECT TO GIVE NOTICE TO THE COMPANY.

An insurance agent who, in consideration of his being given the right of effecting insurance against fire in companies represented by him, undertakes to attend to the insurances, to see that the policies are duly made out, and to give the necessary notices required to be given from time to time, but upon a further insurance being subsequently effected through him, omits to give any notice thereof, whereby the insured were damnified.

(100) McLachlan *vs* Ætna Ins. Co., 4 All., 173.
(101) Palmer *vs* Ocean Marine Ins. Co., 29 N. B. Rep., 501.

is liable for the damages sustained by reason of his omission. (102)

FOURTH. — ESTOPPEL BY CONDUCT OR REPRESENTATIONS OF LOCAL AGENT AFTER THE LOSS.

Vide Estoppel by conduct of Company, supra, page 227.
Also Waiver after loss, supra, page 178 et seq.

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(102) Baxter *vs* Jones, 4 O. L. R., 541.

CHAPTER VII

WARRANTIES AND CONDITIONS.

Warranty reduced to a misrepresentation. — Warranty as to future. — Condition in policy equivalent to warranty. — Statutory conditions. — Legislation in different provinces. — United States Standard policy. — Application of statutory conditions to interim receipts.

Except where statutory authority has intervened, the parties may frame their own contract and introduce such terms and conditions as they deem fit.

Where there is a stipulation in the contract whereby the obligation to indemnify is made conditional upon the truth of certain statements, such a condition is termed a warranty, and if the statements are untrue, whether the misrepresentation is material or not, the insurer may treat the contract as void.

The distinction between Warranties and Representations is clearly laid down by Lord Mansfield. (1) He says:

"There cannot be a clearer distinction than that which exists between a warranty which makes part of the written policy, and a collateral representation which, if false in a point of materiality, makes the policy void; but if not material it can hardly ever be fraudulent."

The doctrine is thus expressed by Lord Chancellor Eldon: (2)

"It is a first principle in the law of insurance, on all occa-

(1) Pawson *vs* Watson, Cowp. Rep., 787.

(2) Newcastle Fire Ins. Co. *vs* MacMorran, 3 Dow. 255.

sions, that where a representation is material it must be complied with — if immaterial, that immateriality may be inquired into and shown; but that if there is a warranty it is part of the contract that the matter is such as it is represented to be. Therefore the materiality or immateriality signifies nothing. The only question is as to the mere fact."

In the House of Lords, (3) Lord Blackburn, says:

"In policies of marine insurance, I think it is settled by authority that any statement of a fact bearing upon the risk introduced into the written policy, is by whatever words and in whatever place, to be construed as a warranty and, *prima facie* at least, that the compliance with that warranty is a condition precedent to the attaching of the risk. I think that on the balance of authority the general principles of insurance law apply to all insurances, whether marine, life, or fire."

IN THE PROVINCE OF QUEBEC WARRANTIES IN INSURANCE CONTRACTS ARE GOVERNED BY ART. 2490 OF THE CIVIL CODE.

"2490. Warranties and conditions are a part of the contract and must be true if affirmative, and if promissory must be complied with; otherwise the contract may be annulled notwithstanding the good faith of the insured.

"They are either expressed or implied."

WARRANTIES REDUCED TO MISREPRESENTATIONS.

The law relating to warranties in fire insurance contracts, as above expounded, is applicable to contracts made in the Provinces of Quebec, (3a) New Brunswick and Prince Edward Island. In all the other provinces of Canada, owing to the introduction of legislation limiting the conditions which the insurer may attach to the contract, warranties are reduced to the same category as misrepresentations, and only avoid the policy when material. (Vide infra, p. 340).

(3) Thomson *vs* Weems, 9 App. Cas., 671.

(3a) The extent to which this statement of the law will apply in the Province of Quebec when the Quebec Insurance Act comes into force is considered, infra, Cap. X.

Some of the forms of fire insurance contract in use in Canada attempt to extend the conditions by inserting certain provisions in the body of the policy beyond those of time and place, and which could only be given effect to as warranties or conditions precedent to the policy taking effect, but such provisions are entirely nugatory, as, if given effect to, they would nullify the provisions of the statutory conditions.

Policies of insurance are to be construed by the same rule as other contracts and agreements; therefore, where there is an express warranty there is no room for implication of any kind. (4)

WARRANTY.—"TO THE BEST OF HIS KNOWLEDGE AND BELIEF."

Where an application contained a covenant that the applicant warranted that the answers to certain questions were true "to the best of his knowledge and belief", and the application contained in the subsequent part an agreement that any mis-statement should void the policy, it was held that taking the covenants together there was no warranty of the absolute truth of the answers made by the applicant. (5)

In the Supreme Court of Canada it was held per Strong, J., that an application not referred to or made part of the policy in insurance nevertheless could be connected therewith by verbal testimony, so as to make the assured bound by a warranty contained in the application, while Ritchie, C. J., was of a contrary opinion. (6)

The following clause in the application "and the said applicant hereby covenants and agrees to and with the same company that the foregoing is a just, true and full exposition of all the facts and circumstances in regard to the condition, situation and value of the property to be insured so far as the same are known to the applicant and are material to the risk, and agrees and consents that the same be held to form the basis of the liability of

(4) Scott *vs* Fire Ins. Co., of Quebec, 5 Rev. de Leg., 76.
(5) Confederation Life Ass. Co. *vs* Miller; 14 Can. S. C. R., 330.
(6) North British Ins. Co. *vs* McLellan; 21 Can. S. C. R., 288.

the company and shall form a part and be a condition of the insurance contract" does not constitute an absolute warranty but the answers given by the assured only amount to warranties under said clause in so far as they are material to the risk. (7)

WARRANTY AS TO THE FUTURE.

KEEPING PAILS OF WATER.

Where by a policy the insured agreed to keep twelve pails full of water on each flat of the building during the continuance of the policy, and he neglected to do so, but it appeared that the loss was not in any way affected by his default. Held, that nevertheless he could not recover. (8)

CLAUSE AS TO BRICKING BUILDING.

A clause in a fire policy, that the house was "à être lambrissée en brique", does not constitute a warranty of a promissory nature that the house will be immediately covered with brick, but merely expresses the intention of the insured to brick the building when circumstances would permit. Moreover, if the insurance company, after the expiration of a year, accepts a renewal premium, while the house is still, to their knowledge, in the same state, the company cannot take advantage of the words cited. (9)

WATCHMAN.

A party having a mechanic's lien on a mill in an application for insurance in answer to a question "Is a watchman kept on the premises during the night?" replied, "The building is never left alone, there being always a watchman left in the building when not running." The policy referred to the application as a warranty. After the issue of the policy and without the knowl-

(7) Gillis *vs* Canada Fire Ass. Co.; Q. R., 26 S. C., 166.
(8) Garrett *vs* Provincial Ins. Co. 20 U. C. R., 200.
(9) Northern Assurance Co. *vs* Prevost, 25 L. C. J., 211.

edge of the assured, the watchman was withdrawn. The court held that this was not a warranty that a watchman would continue to be kept. (10)

NON-HAZARDOUS BUSINESS.

An application for insurance contained a warranty as to the nature of the business to be carried on in the future, and that if the premises should be used for the purpose of carrying on any business denominated hazardous, or extra-hazardous, the policy should be void. The jury found that the business carried on at the time the insurance was effected was more hazardous than the new business, and that by adding the new business the risk had not been increased. The Supreme Court of Canada reversed the court below, holding that the provision in the application was a warranty, and that the new business was a hazardous one. (11)

AS TO EXECUTIONS.

A policy of insurance in the A. company was issued to the plaintiff upon an application in which it was stated by him that there was no judgment of seizure against him at the time of the making of said policy. On the expiry of the policy the plaintiff took out a policy in the defendant company, in which it was stipulated to be a condition precedent to its issue that it was based upon the representations and warranties contained in the application upon which the policy in the A. company was issued. Between the issue and expiry of the first named policy a judgment was recovered against the plaintiff and execution issued. This fact the plaintiff did not disclose to the defendant company. Held, that the representation by the plaintiff was not limited in its application to the circumstances at the date of the policy of the A. company, but applied to the circumstances at the date of the policy of the defendant company. (12)

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(10) Worswick *vs* Canada Fire & Marine Ins. Co., 3 A. R., 487.
(11) Sovereign Fire Ins. Co. *vs* Moir, 14 Can. S. C. R., 612.
(12) Long *vs* Phœnix Ins. Co., 34 N. B. Rep., 223.

HOUSE ON HIGHWAY.

A condition indorsed on a policy of insurance against fire provided that if the application for insurance was referred to in the policy it would be considered a part of the contract and a warranty by the insured, and that any false representation by the assured of the condition, situation and occupancy of the property or any omission to make known a fact material to the risk, would avoid the policy. In the application for said policy the insured stated that he was sole owner of the property to be insured, and of the land on which it stood, whereas it was, to his knowledge, and that of the sub-agent who secured the application, situated upon the public highway. Held that as the application was more than once referred to in the policy it was a part of the contract for insurance, and that the misrepresentation as to the ownership of the land avoided the policy under the above condition. (13)

WHERE THERE ARE NO STATUTORY CONDITIONS A PROVISO OR CONDITION IN A POLICY IS EQUIVALENT TO A WARRANTY.

If the representation is with respect to an immaterial fact, but there is a proviso or condition in the policy by which the latter becomes void if the representation is untrue, this will be equally effective to vitiate or destroy the policy as if it were contained in a warranty.

The law in this respect is laid down in the case of Anderson *vs* Fitzgerald, 4 H. of L., 483, and the facts of which more particularly are set out in the report in 1 Ir. Com. L. Rep. 251.

In this case the application contained 27 inquiries, two of which were untruly answered, and the application contained the following declaration.

"I hereby agree that the particulars mentioned in the above proposal shall form the basis of the contract between the assured

(13) Norwich Union Fire Ins. Co. *vs* LeBell, 29 Can. S. C. R., 470

and the company, and if there be any fraudulent concealment or untrue allegation contained therein, or any circumstance material to this insurance shall not have been fully communicated to the said company, or there shall be any fraud or misstatement, all money which shall have been paid on account of this insurance shall become forfeited, and the policy be void."

The policy contained a clause which warranted the truthfulness of 14 of the representations given in the application, but the two which were proven at the trial to be untrue were not so warranted. The policy, however, contained a clause which, after reciting the representations which were warranted, proceeded:

"Or if anything so warranted as aforesaid shall not be true, or if any circumstance material to this insurance shall not have been truly stated, or shall have been misrepresented or concealed, or shall not have been fully and fairly disclosed and communicated to the said company, or if any fraud shall have been practised on the said company, or any false statements made to them in or about the obtaining or effecting of this insurance, this policy shall be null and void; and all moneys paid by or on behalf of the said Patrick Fitzgerald on account of this insurance shall become forfeited."

The question arose as to whether or not these statements in the application referred to in the condition or proviso voided the policy if not material, and the House of Lords held that the clause in the proviso or condition which said that "any false statements made to them (the company) in or about the obtaining or effecting of this insurance, should render the policy null and void", where the representations were untrue, although not warranted, voided the policy.

The question is thus discussed by Lord Chancellor Cranworth:

"Thus, if a person effecting a policy of insurance says, 'I warrant such and such things which are here stated', and that is part of the contract, then, whether they are material or not is quite unimportant, — the party must adhere to his warranty, whether material or immaterial. But if the party makes no warranty at all, but simply makes a certain statement, if that state-

ment has been made *bonâ fide,* unless it is material, it does not signify whether it is false or not false. Indeed, whether made *bonâ fide* or not, if it is not material, the untruth is quite unimportant. If the man on entering into the policy had said that he arrived at Dublin three days previously, whereas he had only arrived that morning, and such statement did not form part of the contract, then, though false, it would be quite immaterial. If there is no fraud in a representation of that sort, it is perfectly clear that it cannot affect the contract; and even if material, but there is no fraud in it, and it forms no part of the contract, it cannot vitiate the right of the party to recover.

"There are several cases which are collected together in the 1st. Vol. of Douglas, in which this principle is well illustrated. But, my Lords, it appears to me that that principle has no application to a case where it is part of the contract, as it is here, that if a particular statement is untrue, then the contract shall be at an end. That distinction appears to me to have been overlooked by the learned judges, and that oversight has been the ground of that which I must consider to be the erroneous conclusion at which they arrived.

"My Lords, it is within this narrow compass that the case lies. We had the advantage of the assistance of eleven of the learned judges of this country. They all took the same view of the case, and they were all of opinion that the learned judges in Ireland committed an error in supposing that the doctrine of representation, as distinguished from warranty, was applicable to the present case, where the representation is itself included in the contract." (14)

To an action on a policy of insurance against fire, the sixth plea set up a condition of the policy, that the statements contained in the application were to be taken and deemed to be warranted by the insured, and alleged that the plaintiff stated he owned the land in fee simple in his own right on which the in-

(14) Anderson *vs* Fitzgerald. 1 Ir. Com. L. Rep., 251; 4 H. of L., 483.

sured premises were, whereas he did not. It appeared that he had a deed in fee simple, but had not paid the price.

Held, that there was no untrue representation.

Another plea set up that the insured stated in the application that there was only one stove on the insured premises, whereas there were two.

Held, that this was an untrue statement which avoided the policy. (16)

Where a policy was made subject to the conditions indorsed thereon, one of which was "Insurance subsisting or effected with other companies must be notified to the Board, and if approved of, to be indorsed on the policy and signed by the Secretary." Held, that this was a condition precedent, and non-compliance with it a bar to the action, though it did not so expressly provide. (17)

A condition of the policy provided that the defendants should not be made liable if the assured made any false representation of the condition, situation or occupancy of the property, or if he omitted to mention anything relating thereto material to be made known in estimating the risk. The defendants pleaded that before the policy issued the plaintiff made a warranty that the supply of water power to his mill was ample during the whole year; that such statement was material to be known in estimating the risk, and that the policy was issued and the contract made on the faith of such warranty; but that the supply of water was not ample for the whole year, either at the time of issuing the policy or of the loss. Demurrer—on the ground that the alleged warranty was not stated to be a part of the contract of insurance, and therefore the breach of it was no defence to the action; also that the plea did not allege that the warranty was false to the plaintiff's knowledge.

Held, that the plea was good. (18)

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(16) O'Neill *vs* Ottawa Agricultural Ins. Co., 30 U. C. C. P., 151.

(17) McBride *vs* Gore District Mutual Fire Ins. Co., 30 U. C. R., 451.

(18) Copp *vs* Glasgow & London Ins., 30 N. B. Rep., 197.

An insurance company required applications for insurance to be made on printed forms containing certain questions which were to be minutely answered, and were declared to form the basis of the insurance. One of the questions was: "Is the property involved in law, or mortgaged? If the latter, to whom, and for what amount?" The answer was: "There is a mortgage on the house for £300"—which was untrue. This application was referred to in the policy, one of the conditions of which was, that if the buildings were described otherwise than as they really were, the insured should not be entitled to any benefit under the policy. Held, 1. That the answer to this question amounted to a warranty, and being untrue, rendered the policy void. 2. That being an essential part of the contract, its materiality was not a question for the jury. (19)

Defendants issued a policy of insurance to plaintiff, insuring his dwelling-house against fire. One of the conditions of the policy required that "all applications for insurance must be made in writing, prepared by an authorized agent of the company, and signed by the applicant, or by his authority; and all statements contained in the application will be taken and deemed to be warranties on the part of the assured." In plaintiff's application for insurance he stated that the size of his house was 28 x 30 feet; that it had been built only about six years, and that it was painted inside and outside. In fact the size of the house was 24 x 29 feet; it had been built about 30 years, and was only painted on the inside. The house having been burnt, and an action brought on the policy, the company pleaded these misstatements of the plaintiff as an answer to the action. The plaintiff, in reply to this, pleaded that the company's agent applied to him to insure, that he was absent from home at the time and did not know the exact size of his house, and so stated to the agent, who verbally agreed with him that the statement in the application should not be considered a warranty of the size of the house, and that if it differed from the size stated in the applica-

(19) Marshall *vs* Times Fire Ins. Co., 4 All., 618.

tion, it should not be considered a misstatement. There was a similar statement with regard to the length of time the house had been built, with this addition, that plaintiff stated to the agent that he believed the house had been built twenty-five or twenty-six years, and also that he had stated to the agent that the house was painted on the inside only. Held, on demurrer, that these were no answers to defendants' pleas; that by the conditions of the policy the statements of the age, size, etc., of the house were expressly made warranties, and that the written contract could not be varied by a mere verbal agreement. (20)

Where by the terms of a policy of insurance, the statements and representations of the application for the policy are made part of the contract and by the policy all such statements and representations are warranted to be true, and the application contains false representations and fraudulent suppressions, the same may be urged by the insurer as a cause of nullity in the contract, and an action lies to have the policy cancelled and delivered up. Where the misrepresentations contained in the application are to the knowledge of the assured, such nullity may be invoked by the insurer without any return of premiums paid. (21)

Warranties in the provinces in which the statutory conditions are in force.

Ontario R. S. O., 1897, c. 203, s. 144, reads as follows:

"S. 144. (1) Where any insurance contract made by any corporation whatsoever, within the intent of section 2 of this Act is evidenced by a sealed or written instrument, all the terms and conditions of the contract shall be set out by the corporation in full on the face or back of the instrument forming or evidencing the contract, and unless so set out, no term of, or condition, stipulation, warranty or proviso, modifying or impairing the effect of any such contract made or renewed after the commence-

(20) Dingee *vs* Agricultural Ins. Co., etc., 3 Pug., 80.

(21) New York Life Ins. Co. *vs* Parent, 3 Q. L. R., 163; 1 L. N., 179.

ment of this Act shall be good and valid, or admissible in evidence to the prejudice of the assured or beneficiary.

"(a). Nothing herein contained shall exclude the proposal or application of the assured from being considered with the contract, and the Court shall determine how far the insurer was induced to enter into the contract by any material misrepresentation contained in the said application or proposal.

"(2) No contract of insurance made or renewed after the commencement of this Act shall contain, or have indorsed upon it, or be made subject to any term, condition, stipulation, warranty or proviso, providing that such contract shall be avoided by reason of any statement in the application therefor, or inducing the entering into of the contract by the corporation, unless such term, condition, stipulation, warranty or proviso is limited to cases in which such statement is material to the contract, and no contract within the intent of section 2 of this Act, shall be avoided by reason of the inaccuracy of any such statement, unless it be material to the contract.

"(3) The question of materiality in any contract of insurance whatsoever shall be a question of fact for the jury, or for the Court if there be no jury; and no admission, term, condition, stipulation, warranty or proviso to the contrary, contained in the application or proposal for insurance, or in the instrument of contract, or in any agreement or document relating thereto shall have any force or validity."

This legislation, so far as fire insurance contracts are concerned, does little more than give statutory force to what had already become law by virtue of the judicial interpretation placed upon the statutory conditions. The decisions following are applicable in all the provinces in which statutory conditions are in force, and in these provinces warranties are reduced to the same level as misrepresentations and only void the policy where material. (21a)

The provisions of the second sub-section of section thirty-three

(21a) The extent to which this statement of the law will apply in the Province of Quebec when the Quebec Insurance Act comes into force is considered, infra, Cap. X.

of "The Insurance Corporations Act, 1892", (Ont.), limiting conditions and warranties indorsed on policies providing for the avoidance of the contract by reason of untrue statements in the applications to cases where such statements are material to the contract, do not require the materiality of the statements to appear by the indorsements but the contract will be avoided only when such statements may subsequently be judicially found to be material as provided by the third sub-section.

Misrepresentations upon an application for life insurance so found to be material will avoid the policy notwithstanding that they may have been made in good faith and in the conscientious belief that they were true. (22)

In his judgment at the trial, in the case following, Patterson, J., said:

"At the foot of the application there is the statement that the applicant warrants, covenants, and agrees to and with the company, that the foregoing is a full, just and true exposition of all the facts and circumstances, condition, situation and value of the property to be insured, as far as the same are known to the applicant. The policy states the insurance to be made upon the faith of all the statements and answers in the application for this insurance being true at this date, and continuing to be true during the life of this policy. The first statutory condition declares that if any person shall misrepresent or omit to communicate any circumstance which is material to be made known to the company in order to enable them to judge of the risk they undertake, such insurance shall be of no force in respect to the property in regard to which the misrepresentation or omission is made; and there is an addition to the second statutory condition which has no very intimate relation to the subject of the condition, and which reads thus: 'And any such application, or any survey, plan or description of the property to be insured referred to herein, shall be considered a part of this policy, and

(22) Venner *vs* The Sun Life Ins. Co., (17 Can. S. C. R., 394). followed in Jordan *vs* Provincial Provident Institution, 28 Can. S. C. R., 554.

every part of it a warranty by the assured, but this company will not dispute the correctness of any diagram or plan prepared by its agent from a personal inspection.' Of all these provisions, I think the first statutory condition is the only one on which the defendants are entitled to rely. By the frame of that condition the Legislature has indicated the extent to which it was deemed just and reasonable that a misrepresentation or omission should affect a policy, and has confined the forfeiture to cases where the circumstance omitted or misstated is material to be made known to the company, in order to enable them to judge of the risk they undertake, or is to the prejudice of the company. The other stipulations which I have quoted, which assume to set aside this limitation, I hold to be conditions which it is not just or reasonable for the company to exact.

"I have therefore to deal with this matter on the footing of a misrepresentation, and not a warranty."

And on appeal to the full court, Wilson, C. J., says:

"The other findings of the learned judge require some consideration.

"His opinion that the addition to the second statutory condition making the application, etc., a warranty, could not be sustained as against the first statutory condition, which made it only a representation, we do not differ from." (23)

In an application for insurance on a building the plaintiff stated its estimated cash value to be $900 and obtained an insurance for $600. The jury found that the actual cash value was $450, but that his estimate was made in good faith, and that he had not been guilty of any fraud or misrepresentation. Held, that under the above condition it was immaterial whether a representation of any fact material to be made known to the defendants to enable them to judge of the risk, was falsely (i. e. untruly to the knowledge of the person making it) or fraudulently made, so long as it was in fact untrue; and that the question of value being such a material fact, and the representation relating thereto being untrue, the policy was avoided.

(23) Quinlan *vs* Union Fire Ins. Co., 31 U. C. C. P., 618.

In this case Hagarty, C. J., said:

"As to the alleged warranty. That can only arise on the 'variations' as though the plea raises the defence as well on them as on the statutory conditions, yet we are bound to hold that the objection is not open on the latter...

"We are, however, unwilling to deprive him of the statutory objection, as he took it at *Nisi prius,* and as we are most reluctant to be forced into a discussion as to whether there was an absolute and unqualified warranty of such a matter as 'estimated cash value', or age of building.

"There might perhaps be some difficulty in holding that a condition making such matters the subject of absolute warranty was reasonable." (24)

In another case the Court said:

"Mr. Moss very forcibly presented the argument that the questions and answers in the plaintiff's application having been made a part of the policies, though those answers were not in terms made warranties or material, became material whether they were in fact so or not; and it was not competent to the plaintiff to shew that whether true or false the state of the title or incumbrance did not affect the risk. The contention is supported by his reference to May, on Insurance, 2nd. ed., sec. 185; and the authorities there cited from decisions of the Courts in several of the states of the neighbouring republic, seem to accord with the text. There is not, however, in those states any law restricting insurance companies from setting up any defence, condition or rule of law that may exempt the companies from liabilities, while here they are restricted and are only permitted to rely upon certain statutory conditions to shield them from what may be unjust claims.

"The condition that the defendants have upon the policies now in question applicable to the defences set up, is the first, which renders the policy void if the insured misrepresents or

(24) Sly *vs* The Agricultural Ins. Co., 29 U. C. C. P., 557.

omits to communicate any circumstance which is material to be made known to the company in order to enable the company to judge of the risk.

"This is different from a condition which in terms makes the company the judge of the materiality, and leaves it open to have the materiality enquired into in the ordinary way in which such questions are determined in courts of justice, that is to say as questions of fact and not of law, by the jury, or the judge, if tried without a jury." (25)

In a recent Nova Scotia case the subject is thus dealt with by a member of the Court:

"In an insurance contract the difference between a 'warranty' and a 'representation' seems to be that a warranty must be strictly complied with, and, if it is not, or is untrue, the policy is avoided, it being of no consequence whether it is material to the risk or not; while a representation, if untrue, will not avoid the policy unless it is material to the risk.

"There is nothing in this contract which, in terms, makes the statements in the application 'warranties' and the fourth statutory condition precludes, I think, this Court from so holding.

"This condition is as follows:

"'Notwithstanding anything in the contract between the assured and the insurer, the question of materiality as to any representation in the application, shall be a question for the Court, provided, however, that such question shall be decided by the Judge or Judges trying or hearing the cause and not by the jury.'

"If the judge is required to pass upon the question of the materiality of the statements in the application they cannot be 'warranties' in the strict sense that they must be absolutely true, or absolutely complied with, but are mere 'representations' which, if untrue, must be material in order to avoid the contract.

"If there is anything in the contract which places these state-

(25) Goring *vs* London Mutual Fire Ins. Co., 10 O. R., 236, per Cameron, C. J.

ments in a different category from ordinary representations, they are contrary to the statutory conditions, and are inoperative, the 4th section of the Act above cited not having been complied with."

The court held in that case that the answers made by the applicant to inquiries respecting two previous fires were not material, and therefore the policy was not voided by non-disclosure, but in the Supreme Court it was unanimously held that this non-disclosure was material and the policy therefore void.

But the holding of the court that warranties are now in Nova Scotia, reduced to the category of misrepresentations, is not affected by the judgment of the Supreme Court and the law in that province, therefore, with regard to warranties, is the same as in the province of Ontario. (26)

Dicta contrary.

Observations occasionally have been made by judges, generally, if not always, as *obiter dicta*, and probably without due consideration, which are opposed to the statement of the law above made, that where the statutory conditions are in force, warranties are of no greater force than misrepresentations which require to be material to void the contract, (26a) and in which the judges imply, if they do not expressly so state, that had the company's defence been based upon the plea of warranty, it might have succeeded. Notwithstanding these remarks, as above pointed out, the law is well settled the other way.

Statutory conditions.

The origin of the statutory conditions in Ontario has been discussed supra, p. 2 et seq. The success which attended their adoption led to similar legislation in Manitoba in 1888, 51 V., c. 26, which now appears as R. S. Man., 1902, c. 87; British Columbia

(26) Harrison *vs* Western Ass. Co., 35 N. S. Rep., 488; 33 Can. S. C. R., 473; McNutt *vs* Western Ass. Co., 40 N. S. Rep., 375.

(26a) Galt, C. J., in Goring *vs* London Mutual, 10 O. R., 236; MacMahon, J., in Stott *vs* London & Lancashire, 21 O. R., 312.

followed in 1893, R. S. B. C., 1897, c. 82; Nova Scotia in 1889, by c. 30 of the Statutes of that year, and R. S. N. S., 1900, c. 147; Alberta and Saskatchewan in 1903, by c. 16 of the Ordinances of the North West Territories and now contained in the Consolidated Ordinances, c. 113.

The rules of law applicable to Fire Insurance contracts in Quebec are set out in art. 2568, et seq. of the Civil Code. (26b)

In the Provinces of New Brunswick and Prince Edward Island no similar legislation has been passed and the general principles of law which govern fire insurance contracts in England are applicable to contracts made in these provinces.

The statutory conditions do not apply to property outside the province where the company is incorporated. (26c)

United States Standard Policy.

In the United States similar reasons to those which led to the adoption of uniform conditions in the Province of Ontario resulted in a standard policy of fire insurance being made compulsory upon all fire insurance companies doing business in the State of New York, by legislation which went into effect on the first day of May, 1887. Similar legislation has since been passed, with substantially the same provisions, by the States of Massachusetts, New Hampshire, Minnesota, Michigan, North Dakota, New Jersey, North Carolina, South Dakota, Connecticut, Rhode Island, Iowa, Louisiana, and Wisconsin. The New York policy, differing in this respect materially from the statutory conditions in force in Canada, not only provides what conditions alone may be attached to a policy of fire insurance, but also provides a form of contract, and permits of no variations except such as are provided for by certain specific clauses which are known as the Application and Survey clauses, Assessment, Instalment, or Credit clauses, Co-insurance clause, Conditions as to incumbrances, Lightning clause, Mortgage clauses, Percentage, Limitation and Value clauses.

(26b) And 8 Ed. VII., c. 69, when the latter statute is brought into force by Proclamation.

(26c) Cameron *vs* Canada Fire, 6 O. R., 392.

In Massachusetts and New Hampshire alone are riders permitted which vary in any respect the conditions.

In the Province of Ontario the statutory conditions are made applicable to contracts of fire insurance by ss. 168, 169 and 170 of the Act (R. S. O., 1897, c. 203), which read as follows:

"168. The conditions set forth in this section shall, as against the insurer, be deemed to be part of every contract (whether sealed, written or oral), of fire insurance hereafter entered into or renewed or otherwise in force in Ontario with respect to any property therein or in transit therefrom or thereto, and shall be printed on every such policy with the heading *Statutory Conditions,* and no stipulation to the contrary, or providing for any variation, addition or omission shall be binding on the assured unless evidenced in the manner prescribed by sections 169 and 170.

"Provided that statutory condition 17 given in section 114 of The Ontario Insurance Act being chapter 167 of The Revised Statutes of Ontario, 1887, shall, notwithstanding anything herein contained, apply to contracts of insurance in force prior to the 13th day of April, 1897."

"169. If the insurer desires to vary the said conditions, or to omit any of them, or to add new conditions, there shall be added on the instrument of contract containing the printed statutory conditions words to the following effect, printed in conspicuous type and in ink of a different colour.

"Variations in Conditions. (1)

"This policy is issued on the above Statutory Conditions with the following variations and additions:

"These variations (*or as the case may be*) are, by virtue of the Ontario Statute in that behalf, in force so far as, by the Court or Judge before whom a question is tried relating thereto, they shall be held to be just and reasonable to be exacted by the company." (26d)

(26d) Substantially the same provisions are contained in R. S. B. C., c. 82, ss. 5, 6, 7; R. S. Man., c. 87, ss. 4, 5, 6; Con. Ord. N. W. T., c. 113, ss. 5, 6, 7; R. S. N. S., c. 147, ss. 4, 5, 6; except lines 7 to 10 of sec. 168 are omitted in the British Columbia statute and the North West ordinances.

"170. No such variation, addition or omission shall, unless the same is distinctly indicated and set forth in the manner or to the effect aforesaid, be legal and binding on the assured; and no question shall be considered as to whether any such variation, addition or omission is, under the circumstances, just and reasonable, but on the contrary, the policy shall, as against the insurer, be subject to the statutory conditions only, unless the variations, additions or omissions are distinctly indicated and set forth in the manner or to the effect aforesaid.

"Provided it shall be optional with the insurers to pay or allow claims which are void under the 3rd, the 4th, or the 8th Statutory Condition, in case the insurers think fit to waive the objections mentioned in the said conditions."

After the Fire Insurance Policy Act was passed, the Courts in Ontario, and subsequently the Privy Council, had to deal with the effect of this legislation, and it was held that the Ontario Act was a valid exercise of its legislative powers by the Legislature of the Province. (27)

INTERIM CONTRACT. — APPLICATION OF STATUTORY CONDITIONS.

If the legislation bringing into force the statutory conditions makes these apply only to *policies* of insurance, this will not include an interim receipt, and where the interim receipt contains a clause that it is issued subject to the conditions of the company's ordinary policies of insurance, the company's own conditions will be read into the statutory conditions and made applicable to the contract so far as they are held just and reasonable by the court or judge. But if the statutory conditions are by the legislation made applicable to all contracts of insurance, and thus include a contract by interim receipt, if the company desires to have its variations made applicable to the contract, it is necessary that the conditions and the variations should be indorsed

(27) Parsons *vs* Citizens Ins. Co., and Parsons *vs* Queen Ins. Co., 43 U. C. R., 261 and 271; 4 A. R., 96 and 103; 4 Can. S. C. R., 215; and 7 App. Cas., 96.

upon the interim contract in the manner provided by the Act. As a corollary to this it follows that where the legislation makes the statutory conditions applicable to all contracts of fire insurance, the only conditions which will govern an oral contract are the statutory conditions.

This statement of the law is deduced as follows:

In the Parsons *vs* Queen Ins. Co., supra, pp. 20, 349, the courts were called upon to determine the application of the statutory conditions to the interim contract of insurance. In that case the interim receipt recited that "the assured proposed to effect an insurance against fire subject to all the usual terms and conditions of the company", and having paid the premium was "held assured under these conditions until the policy was delivered", etc.

The Court of Queen's Bench held that if the company had, before the fire, or before action, issued a policy with their usual conditions such as proved at the trial, and these not the statutory conditions, the Court would, under previous decisions, (28) have been obliged to hold that the policy was, as against the assured, one without conditions of any kind. This decision was affirmed by the Court of Appeal.

In the meantime Mr. Justice Gwynne had held, (29) that the effect of the Fire Insurance Policy Act was to provide that all policies were to be read against all persons alike, whether insurers or insured, as containing the statutory conditions alone, whether these are or are not in the instrument, subject to the provision, however, that if the insured desired to obtain the benefit of any variation to the statutory conditions, he was compelled to print the statutory conditions and the variations on the policy, as provided in the Act.

When Parsons *vs* Queen Ins. Co. came before the Supreme Court, Mr. Justice Gwynne affirmed in this respect his construction of the statute in the Geraldi case, but the majority of the

(28) Ulrich *vs* National, 42 U. C. R., 141; Frey *vs* Wellington Ins. Co., 43 U. C. R., 102.

(29) Geraldi *vs* Provincial Ins. Co., 29 U. C. C. P., 321.

court affirmed the view of the courts below that in this case the insurance contract was one without any conditions.

The Court of Queen's Bench, in McIntyre *vs* National Ins. Co., 44 U. C. R., 501, followed its judgment in Ulrich *vs* National, and Frey *vs* Wellington Ins. Co., and when this case came before the Court of Appeal, (30) that court followed its decision in the Parsons case.

The Parsons *vs* Citizens Ins. Co., and the Parsons *vs* Queen Ins. Co., were finally appealed to the Judicial Committee of the Privy Council, and the view of Mr. Justice Gwynne was adopted by their Lordships, the Committee holding that except in the case of variations properly indicated, the statutory conditions shall be deemed to be part of every policy, making use of the following language:

"It was further contended, and the contention seems to have been supported by some of the Judges, that if the statutory conditions, in cases like the present, are to be deemed to be a part of the policy, they form a part of the contract only as against the insurers, and are not binding on the assured. Their Lordships cannot agree with this construction of the Act. The 1st. section of the Act, which declares that the statutory conditions shall be deemed to be part of every policy of fire insurance, also contains the words 'as against the insurers', and it is evident that these words must have the same meaning in both sections. If the construction put on them by the respondent be correct, it would follow that in a case where an insurance company implicitly followed the direction of the statute, and printed the statutory conditions on its policies without more, the conditions would still be part of the contract only as against the company, and the assured would not be bound by them. Such a construction leads to manifest absurdity, and to consequences which the legislature could not have intended. The preamble of the Act shews that the conditions were passed by the legislature as being 'just and reasonable'. On looking at the twenty-one conditions contained

(30) 5 A. R., 580.

in the schedule, it will be found as might naturally be expected, that they are all, with a trifling exception, protective of the insurers, though probably less stringent than those usually imposed by the companies themselves. They impose obligations, not on the insurers, but the assured. To construe the statute, therefore, as enacting that these conditions are binding only on the insurers, for whose protection they are introduced into the contract, and not on the assured by whom they are to be performed, would be to affirm that the legislature had used words signifying, in effect, that the conditions which it has declared shall be a part of the contract shall not be binding at all. But effect may be given to the words in question without resorting to such a construction of them.

"Strong reasons would be required to shew that the words 'as against the insurers' are used in the 2nd section in a different sense from that in which they are used in the 1st, but none can be suggested. The 2nd section provides as an alternative, that unless the variations are shewn in the prescribed manner, the policy shall, as against the insurers, be subject to the statutory conditions only, that is to say, the variations as against the company shall not, and the statutory conditions shall, avail. If the respondent's construction were to prevail, though the consequences under this section might not be so manifestly absurd as in the case already adverted to of a company having simply printed the statutory conditions without more, it would still lead to much injustice: for if a company in making variations, though in all other respects complying with the statute, should not use what might be thought conspicuous type or ink of the right colour, not only would the variations it had attempted to make be of no effect, but it could not invoke the statutory conditions and the insured would be free from any conditions whatever.

"It may possibly have been intended to give to the assured an option, if he thought the company's conditions more favourable to him than the statutory ones, to stand upon the added conditions; but it could not have been intended, nor does the lan-

guage of the Act need such a construction, that he should be set free from both sets of conditions. The meaning of the legislation, though no doubt unhappily expressed, appears to be, that whatever may be the conditions sought to be imposed by insurance companies, no such conditions shall avail against the statutory conditions, and that the latter shall alone be deemed to be part of the policy, and resorted to by the insurers, notwithstanding any conditions of their own, unless the latter are indicated as variations in the prescribed manner."

The quotation above given is taken from the judgment in the Citizens Ins. Co. *vs* Parsons, where the action was brought upon a policy, but in the Queen Ins. Co. *vs* Parsons, a report of which begins on p. 122, (7 App. Cas.), the Court takes into consideration the question as to whether the statutory conditions are applicable to an interim receipt in the same way as they are to a policy of insurance, and comes to the conclusion that the receipt was not a policy of insurance within the meaning of the Fire Insurance Policy Act, and that the company having the right under the interim receipt to issue a policy with its own conditions printed as variations to the statutory conditions, in the manner prescribed by the Act, and that as it ought to be presumed that the company would perform the contract when it came to issue the policy, the company's own conditions ought to be read into the interim contract to the extent to which they might lawfully be made a part of the policy when issued by following the direction of the statute, subject always to the statutable condition that they should be held just and reasonable by the Court or judge.

After the decision of the Judicial Committee in the Parsons' case, there came before the Court of Queen's Bench the case of Devlin *vs* The Queen Ins. Co. (31) Here there was a similar interim receipt to that set out in the case of Queen Ins. Co. *vs* Parsons, and the company had issued a policy thereon containing simply its own conditions, which amongst others provided that:

(31) 46 U. C. R., 611.

"The insured shall not be permitted to abandon any property insured which shall be injured in consequence of fire without the express consent of the company or its agent, but it shall be the duty of the insured by himself or his servants, or other persons in his employ, to at once do all in their power to save and protect the property to prevent any further injury thereto."

The jury, to the question "Did the plaintiff wilfully neglect to save or prevent others from saving the insured property?" answered "Yes." The court, after stating that it was not prepared to hold that a plea to the action not based upon any statutory or other condition that the "plaintiff wilfully neglected to save and unlawfully prevented others from saving the property in question", did not disclose a bar to the claim irrespective of any condition, directed that there should be a new trial as on a policy with the statutory conditions only.

By the original Fire Insurance Policy Act, which was the subject of consideration in Citizens Ins. Co. *vs* Parsons, and Queen Ins. Co. *vs* Parsons, the word "policy" was not defined by statute, and the court, as above pointed out, was called upon to consider whether or not it included an interim receipt. The Act bringing into force the statutory conditions in Ontario made use of the word "policy" and not "contract". Sec. 1 read as follows: (39 V., c. 24):

"The conditions set forth in the schedule to this Act shall, as against the insurers, be deemed to be part of every policy of fire insurance hereafter entered into or renewed or otherwise in force in Ontario with respect to any property therein, and shall be printed on every such policy with the heading 'Statutory Conditions', and if a company (or other insurer), desire to vary the said conditions, or to omit any of them or to add new conditions, there shall be added in conspicuous type, and in ink of different colour, words to the following effect:—

"Variations in Conditions.

"This policy is issued on the above statutory conditions, with the following variations and additions:

"These variations (*or as the case may be*) are, by virtue of the Ontario Statute in that behalf, in force so far as, by the court or judge before whom a question is tried relating thereto, they shall be held to be just and reasonable to be exacted by the company."

This phraseology was not changed until the Ontario Insurance Act of 1887 was brought in force by 50 V., c. 26. Here for the first time, in section 114, the word "policy" is struck out and the first paragraph is made to read:

"The conditions set forth in this section shall, as against the insurers, be deemed to be part of every contract, whether sealed, written or oral, of fire insurance hereafter entered into", etc.

This change had become necessary by reason of the amendment to the Fire Insurance Policy Act made by 54 V., c. 20, which provides, s. 3:

"In case of a verbal contract of such (fire) insurance, the statutory conditions set forth in the Fire Insurance Policy Act, (R. S. O., c. 162), shall be deemed to be part of the verbal contract, and no stipulation to the contrary or providing for any variation, addition or omission, shall be binding on the insured."

By 60 V., (1897), c. 36, (The Ontario Insurance Act,) "contract" is defined as follows: (31a)

S. 2, ss. (23): "Contract means and includes any contract or agreement, sealed, written or oral, the subject matter of which is within the intent of ss. (35) of this section."

And ss. (35) defines "insurance" as follows:

"Insurance includes the following, whether the contract be one of primary insurance or of re-insurance, and whether the premium payable be a sum certain or consist of sums uncertain or variable in time, number or amount:—

"(c) Insurance of property against any loss or injury from any cause whatsoever, whether the obligation of the insurer is to indemnify by money payment or by restoring or re-instating the property insured;

(31a) This Act is reproduced *verbatim* in the Revised Statutes of Ontario, 1897, as chapter 203.

"(g) Generally any contract in the nature of any of the foregoing, whereby the benefit under the contract accrues payable on or after the occurrence of some contingent event."

Since the enactment of this legislation, the interim receipt is undoubtedly a contract of insurance, and is subject to the statutory conditions.

S. 144, ss. (1) of the Act provides as follows:

"Where any insurance contract made by any corporation whatsoever, within the intent of section 2 of this Act is evidenced by a sealed or written instrument, all the terms and conditions of the contract shall be set out by the corporation in full on the face or back of the instrument forming or evidencing the contract, and unless so set out, no term of, or condition, stipulation, warranty or proviso, modifying or impairing the effect of any such contract made or renewed after the commencement of this Act shall be good and valid, or admissible in evidence to the prejudice of the assured or beneficiary."

But ss. 4 of the same section expressly provides that the earlier subsections should not impair the effect of the provisions relating to the statutory conditions 168 to 173 inclusive, and therefore, this section does not alter or affect the interpretation or construction to be placed upon s. 168.

This was the view expressed by the Court of Queen's Bench in Findley *vs* Fire Ins. Co. of North America. (32) In this case, Street, J., said:

"The insurance policy does not contain the statutory conditions; a number of conditions are incorporated in it, but they are not printed as variations from the statutory conditions, and they must, therefore, be disregarded. I must treat the policy as subject to the statutory conditions and to no other conditions: Citizens Ins. Co. *vs* Parsons, 7 A. C., 96."

His decision having been appealed to the full court, the judgment in appeal was pronounced by Armour, C. J., who after

(32) 25 O. R., 515.

concurring in the opinion of the Court of Appeal in another case as to the construction to be placed upon the first statutory condition, held that the contract of insurance was subject to the statutory conditions only, and further said:

"I do not think that the Act 55 Vict., ch. 39, sec. 33, (O), has altered the law in this respect, for it provides that nothing therein contained shall be deemed to impair the effect of the provisions contained in sections 114 to 118, inclusive, of the Ontario Insurance Act." (32a)

As a result, the interim receipt is subject to the statutory conditions, even if not expressed or printed thereon, but as the interim receipt is now included in the word "contract" and the statute no longer limits the application of the statutory conditions to a policy of insurance as it did at the date of the decision in Queen Ins. Co. *vs* Parsons, if the company desires to have its variations to the statutory conditions apply to the interim contract, it is necessary that the statutory conditions, with the variations, should be printed as provided by the statute, on the interim receipt.

In Coulter *vs* Equity Fire Ins. Co., (33) the reasoning of Mr. Justice Garrow who gave the judgment of the Court of Appeal, is based upon the view that where there is a parol contract of insurance only, it must be read as subject to both the statutory conditions and the usual variations attached to the company's policies, if just and reasonable. It is submitted that the view of Chief Justice Meredith in the court below was the correct one, and that the parol contract is only subject to the statutory conditions for the same reason as has been given above for the statement that the only conditions applicable to the interim receipt are the statutory conditions, unless both the statutory conditions and variations are printed upon the receipt.

We have shown above that according to the statute law of the Province of Ontario and the decisions of the courts thereon, the

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(32a) Statutory Conditions now sections 168-173.

(33) 9 O. L. R., 35.

interim contract of insurance, whether printed, written or oral, is subject to the statutory conditions and to these only, unless, where the contract is written or printed, the statutory conditions are also printed with such variations as may be held to be just and reasonable by the court or a judge.

We have to consider next whether this statement of the law in Ontario is equally applicable to interim contracts of insurance in the other provinces of Canada, where statutory conditions are in force.

INTERIM CONTRACT.— MANITOBA.

In the Province of Manitoba, the language enacting the statutory conditions is substantially the same as that which was in force in the Province of Ontario when Citizens Ins. Co. *vs* Parsons, and Queen Ins. Co. *vs* Parsons were adjudicated upon by the courts, the section reading as follows: (34)

"The conditions set forth in the Schedule A to this Act shall, as against the insurers, be deemed to be part of every *policy* of fire insurance which has been, since the sixteenth day of July in the year one thousand eight hundred and eighty-eight, or which shall hereafter be entered into or renewed or otherwise in force in Manitoba, with respect to any property therein, and shall be printed on every such policy, with the heading 'Statutory Conditions'."

In that province, therefore, if the interim contract makes no reference to conditions whatsoever, it is a contract without conditions, and is only subject to the general law applicable to fire insurance contracts. If the interim contract, as in the Parsons' case, provides for the issue of a policy according to the usual terms and conditions of the company, then in an action upon the interim contract the company may set up such conditions as it is accustomed to attach to ordinary policies of insurance, and the contract will be read as if there were printed on the interim contract these statutory conditions, and, as variations thereto, the ordinary and usual conditions of the company.

(34) R. S. Man., 1902, c. 87, s. 3.

INTERIM CONTRACT.— NOVA SCOTIA, BRITISH COLUMBIA, ALBERTA AND SASKATCHEWAN.

In the provinces of Nova Scotia, British Columbia, Alberta and Saskatchewan, the language of the sections making the statutory conditions applicable to contracts of fire insurance in those provinces is substantially the same as the language used in the Ontario Act, and instead of the word "policy" being used, the expression is "every contract, whether sealed, written or oral, of fire insurance", etc., and accordingly in these provinces, as in Ontario, the interim contract, whether written, printed or oral, is subject to the statutory conditions, and these only, unless, where the contract is written or printed, the statutory conditions are also printed along with such variations as the court or a judge may deem reasonable. (34a)

QUEBEC CASES.

The plaintiff insured his property under the following short risk rate:

"No. 721. Short Risk Receipt.
" Montreal, 28th August, 1876.

" Received from Xavier Limoges, Esq., the sum of five dollars, being the premium on assurance against the loss or damage by fire effected with the Company to the extent of $2,000 on a brick-encased building in course of construction on Champlain Street, Point St. Charles, near Montreal (including carpenter's risk) for one month... subject to the conditions of the Fire Insurance Policies of this Company. The said loss or damage payable to the said Xavier Limoges, Esq., or order.

" Period, one month.
" Premium, $5.00. "Hugh Allan, President.
" Stamps, 15 cents." "per Jno. Hutchinson, Manager."

On the same day he effected another insurance with the Royal Company. One of the defendants' conditions was that the assured

(34a) In the Quebec Insurance Act, the word used in "contract" and not "policy", *vide* infra, Cap. X.

must give notice to the defendants of any other insurance effected on the same property, and have the same endorsed on his policy, or it would be void. A fire having occurred within three days, and there being no endorsement on the short risk receipt, of the further insurance in the Royal, the defendants contested their liability. The evidence showed that the insured had asked the agent upon receiving the receipt, for a policy but he was told that it was not the usage of the defendants to give a policy for such insurances. It was held, Dorion, C. J., and Monk, J., dissenting, that the refusal of the defendants to give a policy was equivalent to an acknowledgment on their part, that the condition in question could not attach, and if it could attach the refusal to deliver the policy operated as a waiver of the condition, and that the defendants were estopped from availing themselves of a condition which they themselves prevented being fulfilled. (35)

The holding in this case by the majority of the court must be taken to be overruled by the decision in the Queen Ins. Co. *vs* Parsons, 7 App. Cas., 122, and the law now is that the insured is bound by the ordinary conditions of the company's policies if the interim receipt expressly so provides.

The company appellant effected an insurance with the company respondent for the fidelity of certain of appellant's employees, amongst whom was one Boisvert. An interim receipt for the premium was given in which it was stated that it was issued "subject to the conditions of the company's general form now in use for the class of risk." Before the expiration of the three months allowed for the issue of the policy under the conditions of the interim receipt, there was a shortage in Boisvert's accounts, for which the appellant made a claim under the contract of insurance. The respondent pleaded that by one of the conditions of its ordinary policy the insured was obliged to prosecute the defaulting employee to conviction with all diligence, and that as this condition had not been complied with by the plaintiff, appellant, it could not recover.

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(35) Lafleur *vs* Citizens Ins. Co., 22 L. C. J., 247.

Held, (affirming the judgment of the Superior Court) : — 1. The condition of the respondent's ordinary form of policy for this class of risk must be included and read into the text and meaning of the interim receipt. The acceptance of the receipt in this form must be held to indicate either that appellant knew what these particular conditions were, or had such a knowledge of the general conditions in use by guarantee companies, that it was willing to be bound by them.

2. It was not an unreasonable condition that the employer should as a condition precedent, use all possible diligence to prosecute the defaulting employee to conviction. (36)

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(36) La Canadienne Compagnie d'Assurance sur la Vie *vs* London Guarantee & Accident Co., Q. R., 9 Q. B., 183.

CHAPTER VIII

STATUTORY CONDITIONS.

Misrepresentation. — Concealment of changes in risk. — Vacancy. — Assignment of property insured. — Alienation. — Salvage. — Double insurance. — Losses not covered by policy. — Proofs of loss. — Arbitration. — Loss: when payable. — Rebuilding. — Cancellation of policy. — Prescription. — Notices. — Variations to conditions.

Condition 1. (Ontario).

"If any person or persons insures his or their buildings or goods, and causes the same to be described otherwise than as they really are, to the prejudice of the company, or misrepresents or omits to communicate any circumstance which is material to be made known to the company, in order to enable it to judge of the risk it undertakes, such insurance shall be of no force in respect to the property in regard to which the misrepresentation or omission is made." (1)

(1) Condition 1. — Corresponding section in the Fire Insurance Policy Acts of the other provinces of Canada:
British Columbia, stat. cond. one: the same as Ontario.
Alberta & Saskatchewan, stat. cond. one: the same as Ontario.
Manitoba, stat. cond. one: the same as Ontario, except:
line 1, For *insures* read *insure.*
line 2, For *causes* read *cause.*
line 3, 4, For *misrepresents or omits* read *misrepresent or omit.*
Nova Scotia, stat. cond. one: the same as Ontario, except:
line 3, 5, For *company* read *insurer.*
line 5, For *it* read *the insurer.*
line 6, For *it undertakes* read *undertaken.*

MISREPRESENTATION OR CONCEALMENT OF A MATERIAL FACT WILL VOID THE POLICY.

Utmost good faith between the parties is a fundamental principle applicable to all contracts of insurance, and this requires from the insured a full disclosure of all facts and circumstances within his knowledge which are material to be made known to the insurer to enable him to judge of the risk he undertakes. This rule of law was applied in marine insurance—the *fons et origo* of all other kinds of insurance—long before it was the practice of insurers to make the contract subject to an express condition to that effect.

In Carter *vs* Boehm, (2) Lord Mansfield said:

"First. Insurance is a contract upon speculation.

"The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only; the under-writer trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge, to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risque, as if it did not exist.

"The keeping back such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention; yet still the under-writer is deceived, and the policy is void; because the risque run is really different from the risque understood and intended to be run, at the time of the agreement...

"The reason of the rule which obliges parties to disclose, is to prevent fraud, and to encourage good faith. It is adapted to such facts as vary the nature of the contract; which one privately knows, and the other is ignorant of, and has no reason to suspect.

"The question therefore must always be 'whether there was, under all the circumstances at the time the policy was underwritten, a fair representation; or a concealment; fraudulent, if

(2) 3 Burr., 1906.

designed; or, though not designed, varying materially the object of the policy, and changing the risque understood to be run.' "

In later days when it became the practice to attach a condition to contracts of insurance making them void for misrepresentation or concealment of material facts, such a condition did no more than crystallize what would, without it, have been the law governing the contract. Similarly, when the statutory conditions were adopted in Ontario, the *first* condition did no more than declare what would have been the law of the contract if it had not been so expressed.

This fact is of some importance in considering the weight to be attached to decisions prior to the statutory conditions.

In the Province of Quebec the law with respect to misrepresentation is substantially the same as the English law which governs in the other provinces of Canada, and is codified in the following articles:

"Art. 2485. The insured is obliged to represent to the insurer fully and fairly every fact which shows the nature and extent of the risk, and which may prevent the undertaking of it, or affect the rate of premium."

"2486. The insured is not obliged to represent facts known to the insurer, or which from their public character and notoriety he is presumed to know; nor is he obliged to declare facts covered by warranty express or implied, except in answers to inquiries made by the insurer."

"2487. Misrepresentation or concealment either by error or design, of a fact of a nature to diminish the appreciation of the risk or change the object of it, is a cause of nullity. The contract may in such case be annulled although the loss has not in any degree arisen from the fact misrepresented or concealed."

"2488. Fraudulent misrepresentation or concealment on the part either of the insurer or of the insured is in all cases a cause of nullity of the contract in favour of the innocent party."

"2489. The obligation of the insured with respect to representation is satisfied when the fact is substantially as represented and there is no material concealment."

THE MISREPRESENTATIONS MAY BE EITHER AS TO PHYSICAL OR MORAL HAZARDS.

Where the policy is based upon an application containing statements or representations relating to matters as to which the insurers have required information, the first of the statutory conditions in sec. 114 of R. S. O., c. 167 (1887) must be taken to refer to such statements and representations, whether the risk they relate to is physical or moral.

And where in the application the insured was asked whether any incendiary danger to the property was threatened or apprehended, and untruly answered "no":—

Held, that the policy was avoided. (3)

MISREPRESENTATION AS TO INCUMBRANCES.

In Ontario prior to 1873, contracts of insurance effected by Mutual Companies were governed by the provisions of the Mutual Insurance Companies Act, Cons. Stats. of Upper Canada, c. 52, which contained in s. 27 the following provision:

"If the assured has a title in fee simple unincumbered, to the building or buildings insured and to the land covered by the same, any policy of insurance thereon issued by the company which is signed by the President and countersigned by the Secretary, shall be deemed valid and binding on the company, but not otherwise; but if the assured has a less estate therein, or if the premises be incumbered, the policy shall be void unless the true title of the assured and of the incumbrance on the premises be expressed therein and in the application therefor."

Upon the consolidation of the Mutual Insurance Companies Acts, 36 V., c. 44, s. 36, it was provided that a false statement as to title or concealment of incumbrances should void the policy of insurance. This provision was repealed by 39 V., c. 7, sch. A., since which time non-disclosure of incumbrances voids the policy only when material in fact, and, as will be pointed out later,

(3) Findley *vs* Fire Ins. Co. of North America, 25 O. R., 515.

a variation to the statutory condition which declares an incumbrance to be material, irrespective of its nature or amount, is not reasonable, and is inoperative. (4)

The Ontario reports contain many decisions (5) where the defence turned upon misrepresentation as to title or the existence of undisclosed incumbrances. It must not be overlooked in the Provinces which have no similar statute, and where the contract of insurance is subject only to the statutory conditions, that no conclusion can be drawn from these decisions that irrespective of character and amount, incumbrances are material to the risk.

The plaintiff took out a policy of insurance against fire, containing among others, the following conditions; that the company should not be liable to make good any loss or damage if the property insured should be incumbered by mortgage, judgment, or otherwise; also that all applications for insurance must be in writing, prepared by an authorized agent of the company, and signed by the applicant, or by his authority, and that all statements contained in the application would be taken and deemed to be warranties on the part of the insured, and that if the property were an equity of redemption, or if the interest in the property were any other than the entire, unconditional, and sole ownership of it for the use and benefit of the insured, or if the same should be incumbered by mortgage, judgment or otherwise, it must be so represented to the company in the application, otherwise the policy should be void. The agent of the company put to plaintiff the questions in the form of application, and wrote the answers down to and inclusive of No. 9. "Does the property to be insured belong exclusively to the applicant?" The answer being "It does". Question No. 10. "If incumbered,

(4) Reddick *vs* Saugeen Mutual, 15 A. R., 363, infra, p. 489.

(5) Russ *vs* Mutual Ins. Co. of Clinton, 29 U. C. R., 73; Smith *vs* Niagara District Mut. Ins. Co., 38 U. C. R., 570; Walroth *vs* St. Lawrence County Mutual Ins. Co., 10 U. C. R., 525; Stickney *vs* Niagara District Ins. Co., 23 U. C. C. P., 372; Shaw *vs* St. Lawrence County Mutual Ins. Co., 11 U. C. R., 73.

state to what amount", was not put, and though the word "no" appeared to have been written after this question in pencil, it did not appear from the evidence that plaintiff had either written or authorized it. The application was signed by plaintiff as required. The property was mortgaged at the time for $400. A loss by fire occurring, plaintiff brought his action upon the policy. There was no evidence of bad faith or fraudulent intent on the part of plaintiff.

Held, that the plaintiff having accepted a policy containing the condition referred to had violated those conditions, and could not recover. (6)

A policy of insurance provided that the application for insurance should form part of the policy, and one of the conditions, providing what application for insurance should state, declared that if any person insuring should make any material misrepresentation or concealment, the insurance should be void and of no effect. In an action on the policy, defendants pleaded that in the application for insurance, plaintiff represented that the property to be insured was mortgaged, and that the amount of such mortgage was $900; whereas the amount of the mortgage was a greater sum.

Held, that the plea was bad for not alleging that the misrepresentation was material. (7)

The plaintiffs obtained a policy of insurance from the defendants, containing a condition that if the interest of the insured was other than the entire unconditional and sole ownership it must be so expressed in the written part of the policy, otherwise the policy to be void. There was a mortgage to secure the sum of $800 on a portion of the insured property, no mention of which was made in the policy, but the policy had been effected on the verbal application of one of the plaintiffs, who testified that he had told defendants' agent that there was a mortgage of $500

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(6) Kennedy *vs* Agricultural Ins. Co., 1 R. & C., 433. (Before the statutory conditions were in force).

(7) Steeves *vs* Sovereign Fire Ins. Co., 20 N. B. Rep., 394.

on the property (referring apparently to another mortgage, an assignment of which was held by two of the plaintiffs, the equity of redemption being in the plaintiff McLeod, and another who was not a plaintiff). The building was valued in the claim at $2,000, and four of plaintiffs' witnesses testified that it was worth that amount, a fifth that it was worth only $500, while ten witnesses for defendants valued it at sums ranging from $300 to $500. The verdict was for plaintiffs for the whole amount of their claim, not allowing $149 for the proceeds of property saved.

Held, that as there was undisputed evidence of an incumbrance not mentioned in the policy and no evidence of fraudulent omission on the part of the company, and further as the claim had been wilfully exaggerated, and the verdict was excessive in that no allowance had been made for salvage, it must be set aside. (8)

The plaintiffs employed one R., an insurance broker, in no way connected with the defendants, to effect an insurance on their building and stock, informing him of there being incumbrances to a large amount on the building; and they signed a form of application in blank and handed it to R. who filled in the application, except as to incumbrances, which he left blank. R. then applied to one G., who also acted as a broker, and was in no way connected with the defendants; and G. submitted the application to defendants' local agent, who accepted the risk and received the premium. The agent then forwarded the application to the head office for approval, and it was returned to him for information as to the incumbrances. The agent then applied to G. who referred to R. R. having tried but failed to find the plaintiffs stated to G. that there were no incumbrances and G. then tore up the application and filled in another one, stating that there were no incumbrances, and signed the plaintiffs' name to it. This he handed to the agent, and on it the policy issued. It was also proved that after the issuing of the

(8) McLeod et al. *vs* Citizens Ins. Co., 3 R. & C., 156.

policy the plaintiffs effected a further incumbrance on the land, but did not notify defendants. The plaintiffs having sued defendants on the policy, which provided that if the assured was not the sole and unconditional owner of the property insured, unless the true title was expressed therein, the policy should be void.

The policy was made subject to 36 V., c. 44, (Ont.), which provided "that the concealment of any incumbrance on the insured property or on the land on which it may be situate... shall render the policy void."

In giving judgment, Hagarty, C. J., said:

"I am not prepared to say that it can be a matter of indifference to under-writers whether the building in which goods insured is or is not heavily incumbered."

Gwynne, J., after quoting a clause in the conditions of the policy that "if the assured is not the sole and unconditional owner of the property insured, unless the true title be expressed in the application, then this policy shall be void", proceeds to say:

"This form of exception imposes upon the person insuring the onus of taking care that a true statement as to the title is inserted, for silence upon that head, even though the company should effect the insurance, would not suffice to entitle the plaintiff to recover unless he should in truth be sole and unconditional owner, which a person whose property is incumbered cannot be said to be."

In the Court of Appeal, Patterson, J., says:

"In my opinion, the existence of an incumbrance is not a fact or circumstance in regard to the condition, situation, value or risk of the property." (9)

Le fait que l'assuré n'a pas déclaré qu'il est obligé de garder pour un créancier tout ce qu'il touchera, et de lui transporter

(9) Samo *vs* Gore District Mutual Fire Ins. Co., 26 U. C. C. P., 405; 1 A. R., 545; 2 Can. S. C. R., 411.

sa police s'il le désire, ne constitue pas une réticence qui annule le contrat d'assurance. Langelier, J., 1901. (10)

One of the conditions of a policy of insurance was that every incumbrance affecting the property at the time of assurance, must be mentioned in the application, otherwise the policy should be void. The property in question had been conveyed to the plaintiff and his wife by one S. and wife, in consideration, as expressed in the deed, of a then subsisting indebtedness by S. and wife to plaintiff, and of a bond by plaintiff *alone* to support S. and wife during their lives, who by the said deed *released to plaintiff and wife all their claims upon the property.* In his application for assurance plaintiff stated the property to be unincumbered.

Held, affirming the judgment of the Court of Common Pleas, that there was no lien for purchase money, and that the property was not incumbered. (11)

On 21st February, 1879, A. B. & Co., the plaintiffs, gave a mortgage on a mill property covenanting to insure, which they did in the R. company, by policy dated 19th March, 1879, expiring 1st March, 1880. On 10th March, 1879, A. left the firm. On 1st March, 1880, the mortgagees, having received no renewal receipt of the above policy, insured the property in the U. company in the name of the plaintiffs. This U. policy provided that the loss should be payable to the mortgagees, and that the insurance as to the interest of the latter should not be invalidated by any act of the mortgagors, and that if the mortgagors did any act invalidating the policy, and the insurers should pay the amount of the policy to the mortgagees, they should be subrogated to the rights of the latter or might pay the whole of the mortgage debt, and obtain an assignment of the mortgage. There was no written application for the U. policy. The R. policy was

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(10) Bank of Toronto *vs* St. Lawrence Fire Ins. Co., Q. R., 19 S. C., 436.

(11) Mason *vs* Agricultural Mutual Association, 16 U. C. C. P., 493; 18 U. C. C. P., 19.

handed to the insurers, and from it they drew their policy, which had the statutory conditions only. No representations were made to them in any other way. The premium was paid by the mortgagees, who collected it from the plaintiffs, the latter having taken no part in effecting the insurance. On 14th March, 1881, the mortgagees wrote a letter to the plaintiffs in which they represented the U. policy as indisputable. A fire having occurred the U. company paid the mortgagees the amount of the loss, which more than covered the amount due on the mortgage, of which they took an assignment. The evidence shewed that at the time of effecting this policy there were certain insurances on the property, and also certain mortgages, of which the U. company were not informed and to which they never assented. The plaintiff now, suing on the U. policy, claimed to have the mortgage discharged and the balance of the insurance money paid to them, and the U. company counterclaimed for the amount due on the mortgage.

Held, that the non-communication of other mortgages, subsequent to that to the plaintiffs, was not a breach of statutory condition No. 1, because such non-communication will not, apart from stipulation, irrespective of the nature and amount of the other mortgages, and without any imputation of fraud, avoid a policy; and also because the plaintiffs were not bound unasked to state the exact nature and extent of the interest to be insured. (12)

The variations and additions to the statutory conditions provided as follows:

"No. 1. In all cases of application for insurance the applicant shall state the value of property, and also specify the land upon which the building or buildings are situated by its number and concession, or otherwise sufficiently particularize it; also, whether it be freehold or leasehold, or encumbered; or if encumbered, then the applicant shall state the true title and the encumbrances on the premises; otherwise the policy granted thereon shall be void..."

(12) Klein *vs* Union Life Ins. Co., 3 O. R., 234.

The defendants set up in their pleas, first, that the land upon which the insured building was erected was incumbered by two mortgages, a fact which was not disclosed in the application or otherwise to the company, and that by virtue of the conditions, the policy was void, and they also set up the added condition as an answer to the claim.

The judgment turned upon the question as to whether or not the building was a chattel or formed part of the freehold, and in giving judgment, Hagarty, C. J., said:

"It seems to me that there is a most material difference in effecting an insurance on a house owned in the ordinary way as realty in fee unincumbered, and a house on heavily mortgaged premises which the assured claims to have the right to remove free from or to avoid the mortgagee's claims.

"I think a board of directors deciding on the acceptance or rejection of an application, ought in fairness to understand in which of these two positions the house proposed for insurance stands."

The court held, Armour, J., dissenting, that the house was not insured as a chattel but as realty, and that the failure to disclose the incumbrance was fatal. (13)

A STATEMENT THAT THE APPLICANT IS THE OWNER IN FEE SIMPLE IS NOT UNTRUE BECAUSE THE PROPERTY HAPPENS TO BE INCUMBERED.

To an action on a mutual fire policy, defendants pleaded that the plaintiff in his application represented that he held the premises in fee simple, whereas "the plaintiff had not a title in fee simple, and the true title was not, nor is expressed in said policy, or in the application", but not alleging that the plaintiff made any statement as to incumbrances or outstanding equities. Held, that on this issue the plaintiff was entitled to recover, the

(13) Phillips *vs* Grand River Farmers' Mutual Fire Ins. Co., 46 U. C R., 334.

deed to him being absolute though he was in fact only mortgagee. (14)

NON-DISCLOSURE OF INCUMBRANCES WHERE AGENCY INVOLVED.

Vide Sinclair *vs* Canada Mutual, supra, p. 288.
Chatillon *vs* Canada Mutual, supra, p. 273.
Lyon *vs* Stadacona, supra, p. 309.

MISREPRESENTATION OR CONCEALMENT OF OTHER INSURANCE.

In the absence of a special condition, the existence of other insurances is not necessarily material to be made known so as to void the policy.

In Parsons *vs* Citizens Ins. Co., (15) Harrison, C. J., says:

"The third plea alleges that the plaintiff misrepresented a fact material to the risk, that is to say, that there was no other insurance on the property, whereas there was another insurance for $1,000.

"The omission to communicate, at the time of the proposal for an insurance, the fact that there is an insurance already effected with another company is not *per se* such a wrongful concealment as to sustain a plea of fraud. McDonell *vs* The Beacon Fire and Life Ass. Co., 7 C. P., 308.

"The rule nisi does not ask for leave to amend the plea, so as to convert it into a plea of breach of warranty; but, as we have no reason to doubt the *bona fide* of the plaintiff's demand, we would not feel inclined, even if asked, to assist the defendants in such an attempt to defeat the demand of the plaintiff. See Benson *vs* The Ottawa Agricultural Ins. Co., 42 U. C. R., 282."

The policy in this case was issued subsequent to the passing of the Fire Insurance Policy Act which made the statutory conditions applicable to all policies of insurance. But in this case, the court following its previous decision in Ulrich *vs* The Na-

(14) White *vs* Agricultural Mutual Ass. Co., 22 U. C. C. P., 98.
(15) 43 U. C. R., 261.

tional, (16) held that owing to the statutory conditions not having been printed on the policy the contract must be taken to be one *without any condition,* a conclusion which in this very case was reversed in the Privy Council.

A MATERIAL MISREPRESENTATION AS TO OTHER INSURANCE VOIDS THE POLICY.

In his application the applicant said, in answer to an inquiry that the property was covered by $1,500 of other insurance, whereas at that time there existed other undisclosed insurance to the amount of $4,000. The trial judge, who heard the case without a jury, held that this non-disclosure of the other insurance voided the policy, although the mortgagee who brought the action had obtained a renewed receipt which was issued after this undisclosed insurance had been dropped.

The Court of Appeal held that the renewal receipt operated as a new contract, but the judgment in this respect was reversed by the Supreme Court, where it was held that the renewal receipt in the hands of the mortgagee was based upon the representations contained in the original application. (17)

CONCEALMENT OF EXECUTION.

A policy of insurance in the A. company was issued to the plaintiff upon an application in which it was stated by him that there was no judgment of seizure against him at the time of the making of said policy. On the expiry of the policy the plaintiff took out a policy in the defendant company, in which it was stipulated to be a condition precedent to its issue that it was based upon the representations and warranties contained in the application upon which the policy in the A. company was issued. Between the issue and expiry of the first named policy a judgment was recovered against the plaintiff and execution issued.

(16) 42 U. C. R., 141.

(17) Agricultural Ins. Co. *vs* Liverpool, etc., Ins. Co., 33 Can. S. C. R., 94.

Vide also Martin *vs* Home Ins. Co., 20 U. C. C. P., 447.

This fact the plaintiff did not disclose to the defendant company. Held, that the representation by the plaintiff was not limited in its application to the circumstances at the date of the policy of the A. company, but applied to the circumstances at the date of the policy of the defendant company. (18)

MISREPRESENTATION RESPECTING FEAR OF INCENDIARISM WILL VOID THE POLICY.

Action on a fire policy, dated 21st May, 1879, on the ordinary contents of a barn, which was at the time of the insurance empty, and on a reaping and threshing machine. This barn was on the east half of the lot, the plaintiff's homestead and home buildings being on the west half, some distance across the road. In the application for the insurance, dated 13th May, 1879, plaintiff answered "No" to the question "Is there reason to fear incendiarism, or has any threat been made?" On the same day the plaintiff had obtained another policy from defendants on his dwelling-house and home buildings, the same question and answer being contained in his application therefor; and the thresher and reaper in question were then in the home buildings. The fire occurred on the 28th October, 1879. At the trial it appeared that one M., the plaintiff's hired man, about the 8th May had threatened to beat the plaintiff, and the latter, who was a nervous timid man, being alarmed, had had the premises insured; that he had sat up and watched for a night, and that he believed the premises had been set on fire. He denied having any reason for fear except as to his home buildings. At the time of the fire the barn contained some grain and hay, and the threshing and reaping machines, for the loss of which this action was brought. One of the conditions on the policy was that if the assured misrepresented or omitted to communicate any circumstances material to be made known to the company, in order to enable them to judge of the risk, the policy would be

(18) Long *vs* Phœnix Ins. Co., 34 N. B. Rep., 223.

avoided. Held, that the plaintiff could not recover, for the plaintiff having admitted his own belief in the danger and acted upon it, his answer to the above question was untrue. (19)

In answer to the question put by one company in an application for insurance on a mill, "Have you any reason to believe that your property is in danger from incendiarism?" and by another, "Have you any reason to suppose that your property is in danger from incendiarism?" the applicant B. replied to each in the negative. It appeared that the mill had been burnt some months previously, and that the origin of the fire was unknown; and that threats had been made to B. by one R., an intemperate man, who was accustomed to indulge in threats to which no one paid any attention, to burn down the mill. An anonymous letter had also been received threatening incendiarism. Persons supposed to be tramps had been seen about the premises, and B. had warned the watchman to be careful, and mentioned that he had received the anonymous letter. Held, reversing 27 Gr., 121, that the answers were such a misrepresentation as avoided the policy. (20)

The application for insurance contained the inquiry "Is there any incendiary danger to the property threatened or apprehended?" to which the plaintiff replied "no". As a matter of fact an attempt had been made a short time before the application to burn the building in question, and the applicant's husband had watched the building at night after the attempt at setting it on fire, until the insurance had been effected. It was held that this was a circumstance material to be made known under the first statutory condition, and the action was dismissed. (21)

A threat, made four months before the insurance was effected that certain persons would burn the store of insured in a certain contingency, which never occurred (which threat, moreover, was not shown to have had any connection whatever with the fire):

(19) Campbell *vs* Victoria Mutual Fire Ins. Co., 45 U. C. R., 412.

(20) Greet *vs* Citizens Ins. Co., Greet *vs* Royal Ins. Co., 5 A. R. 596.

(21) Findley *vs* Fire Ins. Co. of North America, 25 O. R., 515.

Held not a circumstance material to be known to the insurer. (22)

MISREPRESENTATION AS TO OTHER FIRES.

In an application for insurance against fire, among the questions to the applicant were "Have you... ever had any property destroyed by fire? Ans. Yes. Give date of fire, and, if insured, name of company interested. Ans. 1892. National and London and Lancashire." The evidence shewed that there was a fire on the applicant's property in 1882, and two fires in 1892, and the insurance by the policy granted on this application was on property which replaced that destroyed by the latter fires. Held, reversing the judgment appealed from that the above questions were material to the risk and the answers untrue. The first statutory condition therefore precluded recovery on the policy. (23)

Property insured against fire had been burned three times but the assured, on applying for the policy stated, in answer to a question in the application, that he had property damaged or destroyed by fire only once. Held, that this statement was material to the risk and avoided the policy. (24)

MISREPRESENTATION AS TO INSURABLE INTEREST.

In Klein *vs* Union Ins. Co., the facts of which are set out supra, p. 370, it was held that the non-communication of A's retirement from the firm was not a breach of statutory condition No. 1, because A. though he had retired, retained an insurable interest, both as liable on the covenants in the mortgage, and as still retaining the right to redeem the mortgage.

In an action on a fire insurance policy, application was made at the trial to set up the first statutory condition as a defence in

(22) Kelly *vs* Hochelaga Mutual Fire Ins. Co., en rev., 3 L. N., 63; 24 J., 298; 2 L. N., 347; 19 R. L., 30.

(23) Western Ass. Co. *vs* Harrison, 35 N. S. Rep., 488; 33 Can. S. C. R., 473.

(24) Gillis *vs* Canada Fire Ass. Co., Q. R., 26 S. C., 166.

that a threshing machine insured as plaintiff's own property, was partnership property; and also to set up the fifteenth condition, in that there was fraud and false statement, for the like reason, in the proofs of loss. Held, that the application must be refused, the first condition having no reference to title, and as to the fifteenth, the statement was not proved to be wilfully false and fraudulent, and the fact that the threshing machine was partnership property, was not material, no question as to title having been in the application for insurance asked. As the terms of the policy limited the right of the plaintiff to recover to the extent of his own interest only, the damage was reduced to the extent of that interest. The plaintiff had two barns, Nos. 1 and 2. The threshing machine was insured as "in No. 1 barn". The machine was in No. 2 barn, though the horse power was outside. The plaintiff applied to the company and an indorsement was made on the policy, stating that the machine should be covered "while in any one of the outbuildings insured." Barn No. 2 was insured, though not by the defendants' company. Held, that the machine was covered by the policy, and that the plaintiff was entitled to recover in respect of it. An objection was also made that a reaper, destroyed by the fire, was not covered by the policy. Held, on the evidence, that the objection was not tenable. (25)

The plaintiff in his application to insure a building, stated that it was owned by himself and P., and worked by them as a mill. At that time the mill was in the possession of a tenant under a lease for five years, was mortgaged to its full value, and a line of railway had been laid out through the land, for which the plaintiff claimed damages, alleging that it destroyed the mill. There being nothing in the policy requiring such matters to be disclosed, it was left to the jury, and they found that the non-disclosure was not material. Held, that these questions were properly left. (26)

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(25) Stillman *vs* Agricultural Ins. Co., 16 O. R., 145.

(26) Perkins *vs* Equitable Ins. Co., 4 All., 562.

Where one of the conditions of a policy of insurance, which by the policy were to be referred to in order to explain the right of the parties, when not otherwise therein provided for, was, that if the building insured stood upon leased ground, and it was not so represented to the company and expressed in the policy, the policy should be void:—

Held, that a breach of this condition rendered the policy void, even though in the company's printed forms of application signed by the assured no question was asked as to this.

There cannot be a judgment of nonsuit, and also a judgment for plaintiff on some of the issues. (27)

In answer to the questions "(1) Are the premises occupied by owner or tenant? (2) If by tenant, give name of owner—" a person seeking to effect an insurance against fire answered: "(1) Tenant—as boarding house. (2) Applicant." And another question (the 11th) was: "If the applicant is the owner of the said building—state the value of the building and land;" and he answered $600. In fact the applicant did not own the land, having a lease of it which had only a short time to run, with the right to remove the building, the subject of insurance. Held, that this was such a misrepresentation of the interest of the applicant as rendered the policy void under the first of the statutory conditions in the policy. (28)

MISREPRESENTATION AS TO PREMIUM CHARGED BY OTHER COMPANIES.

The plaintiffs' agent re-insured the defendants in another insurance company, for a portion of their risk on property belonging to H. & Co. in November, 1875, being well acquainted with the property and every circumstance necessary to consider in deciding whether to accept or reject the risk. He renewed the insurance on the 10th March, 1876, at eight per cent., but swore that he was induced to accept seven per cent. premium on the

(27) Ross *vs* Citizens' Ins. Co., 19 N. B. Rep., 126.
(28) Compton *vs* Mercantile Ins. Co., 27 Gr., 334.

25th April, owing to a misrepresentation by the defendants' agent that the defendants and the other insurance companies holding risks on the property had reduced their rate from eight to seven per cent. Held. that such representation, if made, could form no ground for avoiding the policy, inasmuch as the plaintiffs had already accepted the risk on their own judgment of its nature, and the misrepresentation could only have had the effect of inducing them to take a lower premium. (29)

MISREPRESENTATION AS TO VALUE.

Held, in an action on a mutual insurance fire policy, that a representation of present cash value is not a warranty, but is so far material that on the trial the jury should say whether or not there was an over-valuation to the knowledge of the applicant, and, if so, the policy is void. (30)

In an action on a policy of insurance, following the next preceding case, it was held that a representation of present cash value is not a warranty, but is so far material that on the trial the jury should say whether or not there was an over-valuation to the knohledge of the applicant, and if so the policy is void.

Held also, that the term "Machine and Repair shop" did not necessarily mean a shop in which iron work alone is to be done; that it was properly left to the jury to say whether the business carried on there, of making shingles, was that of a machine and repair shop, and that the evidence, fully warranted their finding that it was.

Held also, that the damages, under the evidence stated in the case, were excessive to the extent of $60.00 and a new trial was ordered unless the plaintiff would reduce his verdict by that sum. (32)

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(29) Canada Fire & Marine Ins. Co. *vs* Northern Ins. Co. of Aberdeen & London, 2 A. R., 373. But see Anderson *vs* Fitzgerald, 4 H. L. Cas., 483.

(30) Riach *vs* Niagara District Mutual Ins. Co., 21 U. C. C. P., 464.

(32) Chaplin *vs* Provincial Ins. Co., 23 U. C. C. P., 278.

The application for a policy described the stock-in-trade to be worth $5,000, and the ownership of the goods was stated to be in the two Messrs. R., whereas the value was only $3,500 and the stock only belonged to the two, the rest of the property belonging to them in separate portions, and part to the wife of one. The statements in the application were declared by the insured to be "a just, true and full exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property to be insured, so far as the same are known to me and are material to the risk. And I hereby agree and consent that the sale shall be held to form the basis of the liability of said company, and be binding upon me as material representations in reference to the insurance to be granted hereon." It was left to the jury to say whether the insured made any misrepresentation or misstatement in the application for insurance, or any fraudulent claim against the company, and they answered in the negative. Held, that the whole declaration was qualified by the words, "so far as the same are known to me and are material to the risk"; that the question asked of the jury was substantially a question whether the value was stated by the assured truly so far as known to him; and that on the evidence their finding could not be disturbed. Held also, that the words "in regard to the condition, situation, value and risk of the property to be insured", did not apply to the goods being joint or several property, and that it was not material to the risk. (33)

In an application for insurance on a building the plaintiff stated its estimated cash value to be $900 and obtained an insurance for $600. The jury found that the actual cash value was $450, but that his estimate was made in good faith, and that he had not been guilty of any fraud or misrepresentation.

Held, that under the first statutory condition, it was immaterial whether a representation of any fact material to be made known to the defendants to enable them to judge of the risk, was falsely (i. e. untruly to the knowledge of the person making it) or fraudulently made, so long as it was in fact untrue;

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(33) Kerr *vs* Hastings Mutual Fire Ins. Co., 41 U. C. R., 217.

and that the question of value being such a material fact, and the representation relating thereto being untrue, the policy was avoided. (34)

In effecting insurances in all to the amount of $5,200, the plaintiff represented the property as being of "the cash value" of $5,339 on two occasions, and $5,500 on a third occasion. In an action on the policies the jury found that the value was $4,000 when first insured and $4,200 when the additional insurance was effected; that the plaintiff had misrepresented the value, but not intentionally or wilfully; that it was not material that the true value should be made known to the company and that the company intended that the goods should be insured to their full value, and rendered a verdict in favour of the plaintiff for $3,100, which the Divisional Court subsequently refused to set aside.

Held, (in this reversing the judgment of the Court below) that under the circumstances and in view of the nature of the goods insured, the over-valuation was such, as under the first statutory condition in the policy, rendered the policy void. (35)

Plaintiffs obtained $5,000 insurance on a mill and machinery from defendant company in addition to $4,000 insured in another office. In a letter from plaintiffs to their agents in Halifax, they described the mill and machinery as a good risk for $10,000, (for which they were then instructing them to insure) and estimated that the property could not be replaced for $15,000, although they had purchased it from a bankrupt estate for $3,500. Plaintiffs' witnesses valued the property variously from $12,000 to $20,000 and defendants called no witnesses as to the value.

Held, that the verdict for plaintiffs could not be disturbed under this evidence on the ground of a "false and fraudulent representation, that the property insured was worth $15,000 when its real value was much less." (36)

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(34) Sly *vs* Ottawa Agricultural Ins. Co., 29 U. C. C. P., 557.
(35) Moore *vs* Citizens Fire Ins. Co., etc., 14 A. R., 582.
(36) McGibbon *vs* Imperial Fire Ins. Co., 2 R. & G., 6.
Vide also Eacrett *vs* Perth Mutual, 2 O. W. R., 1011.

MISREPRESENTATION AS TO TITLE OR OWNERSHIP, AND INVOLVING WARRANTY.

Vide Nodwich Union *vs* LeBell, supra, pp. 313, 335.
O'Neill *vs* Ottawa Agricultural, supra, p. 338.

MISREPRESENTATION AS TO NATURE OF THE HAZARD.

The first and second conditions indorsed on a policy declared that it was issued on the faith of the statements in the application, and on the plan showing the situation of the property, and of all buildings or combustible materials within 100 feet of it, being in all respects accurate and true, and containing all the information required to enable the company to judge of the nature and extent of the risk and of the interest of the insured in the property; and that if in such application or plan, or in any written notice to the company respecting any change in the nature of the risk, there should be any untrue or inaccurate statement, whether intentional or not, the policy should be void. The sixteenth condition, after providing that payment of losses should be made in sixty days, and that any difference touching any loss, should, if the company should so require, be settled by arbitration, and that the company should have the option of replacing any property burned, proceeded, "In case of loss, if the property insured be found by arbitration or otherwise to have been overvalued in the survey and description on which this policy is founded, the company shall be held liable only, although there may have been no fraud, for such proportion of the actual value as the amount insured bears to the value given in the application for the insurance effected by this policy."

Held, reversing the judgment of the Court below, that the statements mentioned in the first and second conditions had no reference to over-valuation, which was provided for only by the sixteenth condition.

Quære, whether, if the earlier conditions alone had been inserted, they would have covered statements as to value. (37)

(37) Williamson *vs* Commercial Union Ins. Co., 26 U. C. C. P., 591.

One of the conditions of the policy required the application to state by whom the property was occupied, and whether any manufacturing was carried on within or about it, and plaintiffs had described it as a frame building occupied as a water-power saw-mill. It had been built about 1870, and worked for about four months in every year for three years, from which time until it was purchased by plaintiffs, in December, 1877, it appeared to have been unoccupied and unused as a mill. When plaintiffs purchased they immediately went into possession and put their servants in charge; but the mill could not at that season be worked for want of water even if it had been in working order. Soon after purchasing they set about repairing the dam, which, when finished in April, 1878, was carried away by a freshet, after which plaintiffs proceeded to build another dam, abandoning the idea of working the mill until the increase of water in the autumn. The mill was destroyed by fire in July, 1878. A further condition rendered the policy void for misrepresentation or concealment touching the risk.

Held, that the condition as to defining the occupancy and use had been sufficiently fulfilled by the application which stated accurately the purposes for which the building was erected and intended to be used, and for which it was then used as far as the season of the year would permit, and that there had been no such concealment as to avoid the risk. (38)

A policy of insurance described the chattel property insured as being contained in the building bounded in the rear by a stone building covered with tin. As a matter of fact the building immediately in the rear was covered with wood, and it was here the fire originated. Moreover, this building communicated with the building containing the insured property by means of a door, and the jury found that the door increased the risk as stipulated in the policy. The judges of the Superior Court held that it was the duty of the insured to give an accurate description of the

(38) McGibbon *vs* Imperial Fire Ins. Co., 2 R. & G., 6; 1 C. L. T., 192.

premises and communicate all facts that were material to the risk, which were not known or presumed to be known to the insurers, and that in the present case the insured had omitted to make known a fact which greatly increased the risk, whereby the defendants were not bound to pay the loss. The defendants pleaded that the house and premises wherein the goods were contained had been fraudulently described by reason of the facts above alleged, whereby the insurance became void, but did not plead that the policy was voided by the non-disclosure of facts material to the risk. In the Court of Appeals the judgment of the Superior Court was reversed on the ground that the defence was that the plaintiff had falsely and fraudulently misdescribed the premises and that the jury had not found, nor was there any evidence to support the assertion that there had been any fraud on the part of the plaintiff.

This case would appear to turn entirely upon the form of the defendants' plea, which necessitated their establishing fraud on the part of the plaintiff. Had the defence been simply one alleging material misrepresentation, claiming the benefit of art. 2485 of the Code, the defendants would have been entitled to succeed.

This case however was decided by the Court of Appeals in Quebec before the introduction of the Civil Code. (39)

MISREPRESENTATION AS TO THE NATURE OF THE HAZARD WHERE AGENCY INVOLVED.

Vide Benson *vs* Ottawa Agricultural Ins. Co., supra. pp. 306, 373.

IMMATERIAL MISREPRESENTATION IF FRAUDULENT VOIDS THE POLICY.

Misrepresentation made with intent to deceive, vitiates a policy however trivial or immaterial to the risk it may be; if honestly made it only vitiates when material and substantially incorrect. (40)

(39) Casey *vs* Goldsmid, 3 R. J. R. Q., 144.

(40) Nova Scotia Marine Ins. Co. *vs* Stephenson, 23 Can. S. C. R., 137.

QUESTIONS IN APPLICATION NOT ANSWERED.

Where a question in the application is not answered the policy will not be voided on the ground of non-disclosure of matters material to the risk covered by the question.

As to this Harrison, C. J., said:

"But where what is complained of is not a false answer, but an omission to give any answer, we apprehend it is too late for the company, after the issue of the policy and after a loss, to seek to take advantage of that omission. The time for objecting to the omission was when the application was submitted for approval.

"The company might either then ask for information as to the omission or pass it regardless of the omission. If they adopt the latter course it is not open to them afterwards to take advantage of it to the prejudice of the insured." (41)

Plaintiffs effected a policy of insurance on the SS. "Oakdene" with the defendant company. On the trial, the question arose whether plaintiffs applied for the insurance for themselves, or for the managing owners of the ship. The trial judge having found that the application was effective on behalf of the owners: Held, that his finding should not be disturbed. Among the questions in the application was, "On account of?" followed by a blank, the meaning being "On whose account is the insurance to be made?"—Held, that an answer to the question was waived by the acceptance of the risk without the blank having been filled up. The insurance effected by plaintiffs was $3,200 on disbursements of SS. "Oakdene" at and from Halifax, the amount being intended to cover expenditures made in repairing the ship, which had come into Halifax in distress. (42)

NON-DISCLOSURE OF THE REFUSAL OF AN APPLICATION BY ANOTHER COMPANY NOT A GROUND OF NULLITY.

When a party applies to one agent of an insurance company and is refused insurance, and afterwards applies to another

(41) Sinclair *vs* Canadian Mutual Ins. Co., 40 U. C. R., 206.
(42) Cunard *vs* Nova Scotia Marine Ins. Co., 29 N. S. Rep., 409.

agent of the same company and secures insurance through him in the ordinary mode and preceded by the usual inquiries, the fact that such party does not mention that he had before applied to another agent of the same company for insurance and was refused, is not the concealment of a material fact to render the insurance void. (43)

BUT CONTRA WHERE THE APPLICANT HAD MANY BUILDINGS BURNT UNDER SIMILAR CIRCUMSTANCES.

Lorsqu'une compagnie d'assurance refuse d'assurer, parce que plusieurs des bâtisses semblables à celles qu'on cherche à assurer, appartenant au même propriétaire, ont été incendiées, chaque fois dans les mêmes circonstances, ce fait doit être déclaré par l'assuré lors de la demande pour une nouvelle assurance, comme étant de nature à étendre le risque, et la réticence de l'assuré sur ce point, est une cause de nullité du contrat. (44)

Where there is an application to the same company for another insurance which gives notice of incumbrances, this may be looked at in considering how far there has been misrepresentation when the application for the policy in question does not disclose such incumbrance.

In an application, dated 1st. March, 1876, for insurance in a mutual company for $500 on a saw mill, in answer to the question: "Incumbrances. Is the property mortgaged? If so, state the amount. Is there any insurance by the mortgagee?" the applicant answered, "Yes, $500 mortgage. In case of loss payable to McG. as interest may appear," without mentioning another mortgage for $1,000 on the property. This application was one of three applications made at the same time, and forming one transaction, and though each was on different buildings all were on the same piece of land, 4 ¾ acres. In one of such

(43) Goodwin *vs* Lancashire F. & L. Ins. Co., 18 L. C. J., 1; 16 J., 298; 22 R. J. R. Q., 518.

(44) Minogue *vs* Quebec Fire Ass. Co., M. L. R., 1 S. C., 417. (Confirmé en Revision, M. L. R., 1 S. C., 478); 8 L. N., 340, 377.

other applications, in answer to the question, "What incumbrance, if any, is now on said property?" the answer was, "$1,500 mortgage on this and saw mill property, all insured in this company; 1st. of March application takes effect on saw mill."

Held, under these circumstances, there was no misrepresentation as to incumbrances, and that the company had notice in writing of the truth with regard to them, by means of the two applications, which referred to each other. (45)

A FRAUDULENT MISREPRESENTATION IN THE APPLICATION WILL VOID THE POLICY IN THE HANDS OF A THIRD PARTY.

The action was on a policy of insurance made by one Duval and assigned to the plaintiffs, and a condition of the policy was that it should be forfeited in case of fraud. The company alleged that the application exaggerated the value of the subject matter of insurance fraudulently. The defence was that in any event Duval's fraud would not deprive them of the benefit of the policy. The court below held that the fraud had not been made out. Taschereau, J., says:

"Another legal proposition put forward by the respondents at the hearing is just as untenable. They argued that, even if Duval's fraud had been established, they nevertheless are entitled to recover against the company, because, as they contend, they cannot be held answerable for his fraud. This is a startling proposition. They, as assignees, would have a right of action though their assignor had none. They would have been subrogated to a claim vitiated by fraud, but would yet claim the right to pocket the benefit of that fraud. What a protection to frauds on the insurance companies would such a doctrine carry if it were to prevail." (46)

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(45) McGugan *vs* Manufacturers, etc., Mutual Fire Ins. Co., 29 U. C. C. P., 494.

(46) North British & Mercantile *vs* Tourville, 25 Can. S. C. R., 177.

VARIATION TO CONDITION 1, *Vide* infra, p. 487.

Condition 2. (Ontario).

"After application for insurance it shall be deemed that any policy sent to the assured is intended to be in accordance with the terms of the application, unless the company points out, in writing, the particulars wherein the policy differs from the application." (47)

Where the policy fails to conform to the application, it has been held in Ontario that the insured is entitled to have it reformed, and in this way avoid provisions which otherwise would void the policy.

Meredith, C. J., said: "I am, however, of opinion that the plaintiffs are entitled to succeed on two grounds:

" First, because by the second statutory condition (R. S. O., 1897, c. 203, s. 138), which is applicable to all contracts of fire insurance, after an application for insurance it shall be deemed that any policy sent to the assured is intended to be in accordance with the terms of the application, unless the company points out in writing the particulars wherein the policy differs from the application.

" There was in this case admittedly an application for an insurance for one year, and the premium fixed was for an insurance for that period, and that application was as I have found accepted by the defendants. Had the company sent to the plaintiffs a policy made out according to the terms of the interim receipt, it would undoubtedly have come within the provisions of the second condition, which if it means anything must, I think,

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(47) Condition 2. — Corresponding section in the Fire Insurance Policy Acts of the other provinces of Canada:

British Columbia, stat. cond. two: the same as Ontario.

Alberta & Saskatchewan, stat. cond. two: the same as Ontario.

Manitoba, stat. cond. two: the same as Ontario.

Nova Scotia, stat. cond. two: the same as Ontario, except:

line 3, *Company* reads *insurer*.

be taken to mean that the policy sent is to be read so as to conform with the application or that if it does not conform with it that the assured is entitled to have it reformed so as to do so." (48)

This decision was followed in a case where there was no written application. (49)

In an application for insurance particulars of prior insurance in two other companies, of $4,000 in each company, were given, but in the policy in question, prior insurance on only $4,000 was assented to, neither company being named.

In pronouncing judgment the court said: "I am disposed also to agree with the learned judge in thinking that if the defendants did not intend to assent to the existing insurance for $8,000 in all, they were bound by the second statutory condition to point out in writing the particulars wherein the policy differed from the application." (50)

On the other hand it has been held in the Supreme Court of Canada that where the policy differs from the application, and the insured receives it without complaint, he may be bound by its conditions even where the policy has provisions not contained in his application, or omits provisions which the insured contends it was agreed should form part of the contract.

The Supreme Court said: "If in the course of making a contract one party delivers to another a written document, and the party receiving the paper knows that the other party hands him the document as the contract between them, then the party accepting the document and keeping it, assents to the conditions it contains, and agrees that the contract is as expressed therein, although he does not read it, and does not know what they are." (51)

It has been held in Quebec that the insured cannot be held to

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(48) Coulter *vs* Equity Fire Ins. Co., 7 O. L. R., 180.

(49) Davidson *vs* Waterloo Mutual Fire Ins. Co., 9 O. L. R., 394.

(50) Mutchmor *vs* Waterloo Ins. Co., 4 O. L. R., 606.

(51) Provident Savings Life Ass. Society *vs* Mowat, 32 Can. S. C. P., 147.

a compliance with any conditions of the regular policy issued by the insurance company, which enlarge or vary the terms of the interim contract, so long as the company has neither repudiated nor cancelled the interim receipt, nor substituted a regular policy for it. (52)

Condition 3. (Ontario).

"Any change material to the risk, and within the control or knowledge of the assured, shall avoid the policy as to the part affected thereby, unless the change is promptly notified in writing to the company or its local agent; and the company when so notified may return the premium for the unexpired period and cancel the policy, or may demand in writing an additional premium, which the assured shall, if he desires the continuance of the policy, forthwith pay to the company; and if he neglects to make such payment forthwith after receiving such demand, the policy shall be no longer in force." (53)

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(52) Citizens Ins. Co. *vs* Lefrançois, Q. R., 2 Q. B., 550.

(53) Condition 3. — Corresponding section in the Fire Insurance Policy Acts of the other provinces of Canada:

British Columbia, stat. cond. three: the same as Ontario.

Alberta & Saskatchewan, stat. cond. three: the same as Ontario.

Manitoba, stat. cond. three: the same as Ontario, except:
line 7, *assured* reads *insured*.

Nova Scotia, stat. cond. three: the same as Ontario, except:
line 4, 8, *company* reads *insurer*.

The following is the provision with respect to changes in the risk provided by the Civil Code of Quebec:

"Art. 2574. Any alteration in the use or condition of the thing insured from those to which it is limited by the policy made without the consent of the insurer, by means within the control of the insured, and which increases the risk, is a cause of nullity of the policy.

"If the alteration do not increase the risk, the policy is not affected by it."

A LANDLORD IS NOT AFFECTED BY MATERIAL CHANGES MADE BY HIS TENANT WITHOUT HIS KNOWLEDGE OR CONSENT.

The plaintiffs leased the property to a tenant, who covenanted to keep it insured. The tenant made additions to the building which increased the risk. It was held that this was not within the control of the plaintiff so as to avoid the policy. (54)

THE INSURED IS NOT AFFECTED BY AN INCREASE TO THE HAZARD MADE WITH HIS KNOWLEDGE BY A STRANGER UPON ADJOINING PROPERTY.

A condition of a fire insurance policy on a saw mill stated that "if the risk is increased or changed by any means whatever," without written permission of the insurers, the policy should be void.

In an action on the policy for a loss, the defendants pleaded that before the loss, without the written permission of the defendants, the risk was materially increased and changed by the placing of a portable steam saw mill within 99 feet of the plaintiff's mill.

Held, on demurrer, (Wetmore and Tuck, JJ., dissenting), that the plea was bad in not alleging that the risk was increased by any act of the plaintiff or by his direction. That the erection of a steam saw mill by a stranger on land adjoining that on which the plaintiff's mill was built, as mentioned in the policy, did not come within the words of the condition—"if the risk is increased", etc. (55)

CHANGES IN THE ARRANGEMENTS OR CONDITIONS OF THE INSURED PROPERTY.

One of the conditions was "if the risk shall be increased by any means whatever, or if the buildings shall be occupied in any way so as to render the risk more hazardous than at the

(54) Heneker *vs* British American Ass. Co., 14 U. C. C. P., 57.
(55) Copp *vs* Glasgow & London Ins. Co., 30 N. B. Rep., 197.

time of insuring, such insurance shall be void." After the insurance, certain alterations were made in the premises insured, consisting of the removal from one room to another adjoining it of a couple of dye-kettles, a different disposition of the flues and pipes connected therewith, and the erection of a new chimney, thereby to a slight extent increasing (if considered as an isolated act) but to a great extent diminishing the risk. The jury found that, though the erection of the chimney did *per se* increase the risk, yet that, diminishing it in one place and increasing it in another, the risk on the whole was not increased; and they rendered a verdict for the plaintiff, which was upheld. (56)

A policy of insurance is vitiated by changes increasing the risk made in the buildings insured without legal notice to the insurers. (57)

NEW BUILDING IN PLACE OF OLD. — INSTALLATION OF ELECTRIC LIGHT PLANT.

Where a new building was erected after the insurance to replace an old one on the same site, which existed at the time of the insurance, although not shown on the application and plan of survey, and where also an electric light plant was installed, all without notice to the company, it was held there was no material change or alteration increasing the hazard, and the plaintiff was entitled to recover. (58)

ADDITION OF AN ELEVATOR.

It was a condition, that in the event of any alteration, etc., whereby the risk should be increased, and a consequent additional premium required, the policy should be void, unless notified to defendants and allowed by them, and consequent addi-

(56) Date *vs* Gore District Mutual Ins. Co., 15 U. C. C. P., 175.

(57) British Am. L. Co. *vs* Mutual Fire Ins. Co., 1 L. C. L. J., 95; 18 R. J. R. Q., 168, 525.

(58) Bachand *vs* Mutual Fire Ins. Co., 14 Rev. de Jur., 117.

tional premium paid. It appeared that when the policy was effected by A., he was told by defendants' agent that if an elevator was erected on the premises without informing defendants his policy would be avoided, as in that case he would have to pay an additional premium; but this was not inserted in the policy. A. erected an elevator, and did not give notice to defendants. Held, on a plea setting out the condition, and alleging the erection of the elevator, that the risk was thereby increased and that a consequent additional premium would have thereby been required; that the jury not having found any increase of risk, the facts afforded no defence. (59)

ADDITION OF A STEAM-ENGINE.

The plaintiff insured with defendants on a stone building £400, and on furniture and other goods £200, all at the rate of eight per cent.; on a frame building £100, and on goods and tools therein £50; all at the rate of twelve per cent. It was a condition of the policy "that if after insurance effected the risk shall be increased by any means whatever within the control of the assured, or if such building or premises shall be occupied in any way so as to render the risk more hazardous than at the time of insuring, such insurance shall be void." It was proved that after insuring the plaintiff put up a steam-engine in the frame building, and in order to make it as safe as possible, erected a small engine house of brick at the back of the building. Some witnesses swore that if care was taken the risk would not be increased, but many swore that it would, and it was proved that the plaintiff was told by the agent of the company that if he put up the engine he would have to apply and pay an additional premium; that he made no such application; that he endeavoured to effect an insurance at other offices, but was refused, the risk being considered too hazardous; and that he had acknowledged that he knew the policy was void because he had made no

(59) Todd *vs* Liverpool and London and Globe Ins. Co., 18 U. C. C. P., 192.

arrangement with defendants in consequence of the additional risk. The frame building was destroyed by fire which began in the upper part of it, and a portion of the goods in it was destroyed. The stone house was also much injured by the same fire, and the furniture in it partially destroyed. Held, that under the facts proved the policy was clearly avoided. (60)

ADDITION OF AN OVEN.

A condition provided that if during the continuance of the policy the premises should be used for carrying on any trade or business whereby the risk was increased the policy would be void. After effecting the insurance, the insured built an oven on the premises, but it was safely built, and was only in use for a short time, and there was evidence to show that it did not increase the risk. It also appeared that according to the agent's instructions he had power, when the risk became more hazardous, to cancel the policy, and though aware of the oven did not do so. Held that this did not avoid the policy. (61)

ADDITION OF A GASOLINE ENGINE.

Placer dans les bâtisses assurées une machine à gazoline, d'une nature dangereuse, sans le consentement de l'assureur, est une violation de la police. (62)

KEEPING A WATCHMAN.

In July, 1876, S. of whom the plaintiff was assignee, applied to the agent of the Royal Insurance Company at Woodstock for an insurance of $4,000 on certain mill property, stating in the application that a watchman was kept on the premises at night, etc.; and by a memorandum at the foot of the application he

(60) Reid *vs* Gore District Mutual Ins. Co., 11 U. C. R., 345.

(61) Naughter *vs* Ottawa Agricultural Ins. Co., 43 U. C. R., 121.

(62) Matthews *vs* Northern Ins. Co., 3 R. L., 450; 1 R. C., 475; 20 R. J. R. Q., 44, 509.

covenanted for its truth, and agreed that it should be held to be part and condition of the contract. This application was forwarded to the general agents of the Royal at Montreal, who desiring to assume only $2,000 of the risk applied to defendants there, shewing them the application, and the defendants, without any direct application to themselves, but on the faith of the representations in this application, accepted the risk for $2,000 and issued a policy therefor. The general agent of the Royal wrote to their agent at Woodstock stating that they had only taken $2,000, and given the difference to the defendants, whose receipt for the premium he enclosed. The agent read the letter to S., who paid the two premiums, and in due course received a policy from the defendants. It was proved that when the insurance was effected there was a watchman, but that he had been discontinued some weeks before the fire by which the mill was wholly destroyed, though it probably would have been saved had he been there:—Held, that defendants' policy must be deemed to be based on the application given to the Royal; that the keeping of a watchman was a matter material to the risk, and the statement as to it constituted a continuing warranty, the breach whereof avoided the policy. After the first insurance, S. applied to defendants' agent at Woodstock for a further insurance of $2,000 on the same property, shewing to him the former policy, of which the agent then heard for the first time; and the agent, instead of taking from S. a special application used for this kind of risk, drew up himself an informal one, not signed by S., in which, in a column headed "diagram shewing the risk to be insured, as well as all neighbouring buildings, their construction, roofing, occupation, and distance from each other", he inserted the words "Same as Policy No. 1, 705, 106", the number of defendants' previous policy. Held, that there was not enough to warrant the conclusion that the second policy was issued on the faith of the representation as to keeping a watchman contained in the first application. But under the circumstances a new trial was granted to enable the defendants to furnish further evidence on the point, with leave to add a plea setting up the

materiality to the knowledge of S. of the information as to a watchman, and the omission of S. to tell the defendants that he had been discontinued. (63)

NEW AND MORE HAZARDOUS OCCUPATION.—SALE OF LIQUOR.

The plaintiff, describing himself in the application as a grocer, and his store as being used as a grocery, insured with defendants his stock of groceries, etc., therein, and without the knowledge or assent of the defendants habitually retailed liquor there; but the jury found that the risk was not thereby increased. Held, that there was no misrepresentation or concealment of a material fact; that in insuring a "grocery" defendants knew that liquor might be sold there; and that the plaintiff was entitled to recover. (64)

In the case of a fire policy on buildings described as dwellings, indorsed to the effect that any change of occupation by which the risk is increased, must be notified in writing to the insurance company and indorsed on the policy, and that in default thereof the insurance shall be null and void; the change of occupation to a tavern, without notice to or consent of the company, does not render the policy void, when the jury state in their special findings that an intermediate change of occupation into a vinegar factory had been sanctioned by the company, and that the risk of the tavern was not greater than that of the vinegar factory. (65)

In a policy of insurance effected by the plaintiff for a year in a mutual company, the premises insured were described as a two story brick building, etc., occupied as a tenement dwelling. By a memorandum afterwards indorsed on the policy the building was allowed to be "occupied as a refreshment room, no liquor sold." Afterwards the policy was renewed by a renewal receipt

(63) Whitlaw *vs* Phœnix Ins. Co., 28 U. C. C. P., 53.

(64) Nicholson *vs* Phœnix Ins. Co., 45 U. C. R., 359.

(65) Campbell *vs* Liverpool & London, etc., Ins. Co., 13 L. C. J., 309.

issued under s. 32 of the Mutual Insurance Act, 36 V., c. 44(O). The building was occupied by a tenant of the plaintiff, and it was proved that liquor was sold in the building by the occupant, but without the knowledge or consent of the insured. The defendants set up in their pleas a condition of the policy, that if the hazard was increased by any means within the knowledge of the assured without the defendants' consent, the policy should be void; and alleged that liquor was sold to the knowledge of the insured and without the company's consent, whereby the hazard was increased. The conditions indorsed on the policy did not comply with the Act respecting statutory conditions, which was in force when the policy was renewed. Held, that although under s. 36 of the Mutual Act, which required policies to be under the corporate seal, the indorsement when made, being after the execution of the policy, might not then be deemed a part thereof, it became so on the renewal authorized by s. 32 of the Act, so as to cause the policy to be avoided for the unauthorized sale of liquor on the premises. (66)

Where a condition of a policy of insurance against fire provided that any change material to the risk within the control or knowledge of the insured should void the policy, unless notice was given to the company, it was held that changing the occupation of the insured premises from a dwelling to a hotel was a change material to the risk within the meaning of this condition. (67)

CHANGE FROM A STORE TO A PRINTING OFFICE.

The premises were, when insured, used as a store, and were after insurance used as a printing office, without notice to the company or the settlement and payment of any additional premium for the increased risk, contrary to condition indorsed thereon. Held, that the policy was vitiated. (68)

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(66) Gauthier *vs* Canadian Mutual Ins. Co., 29 U. C. C. P., 593.

(67) Guerin *vs* Manchester Ins. Co., 29 Can. S. C. R., 139.

(68) Hervey *vs* Mutual Fire Ins. Co. of Prescott, 11 U. C. C. P., 394.

THRESHING BY A STEAM ENGINE.

A provision in a policy of fire insurance permitting the insured to use "for the purpose of threshing the crops on the premises a steam thresher with an efficient spark arrester" does not by inference prohibit the use of a steam engine in connection with a machine for crushing grain. The use of a steam engine on one occasion in connection with the machine for crushing grain is not a change material to the risk within the meaning of the statutory condition; that condition refers to some structural alteration in the premises or habitual or permanent alteration in the nature of the work or business carried on. (69)

DWELLING-HOUSE CHANGED TO STORE.

After the owner of dwelling-house property had effected an insurance thereon he leased the premises to a tenant who, without the owner's knowledge, changed the occupation thereof, by bringing in a stock of goods, which he sold out to pedlars. Held, that the owner was not affected by the third statutory condition, R. S. O., 1897, c. 203, s. 168 (3), which requires notice of any change material to the risk within the control or knowledge of the insured, to be given to the company, for, being under lease, the premises were not under the owner's control while the change in the occupation was without his knowledge, and the fact that the change was made by the tenant after the making of the policy was immaterial. (70)

CHANGE OF A TANNERY TO PREMISES FOR DRYING COTTON.

Premises insured as a tannery and leather dressing house were used for drying nine bales of cotton, a substance which it was proved was more inflammable than the stock of a tannery.

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(69) Johnston *vs* Dominion Grange Mutual Fire Ins. Co., 23 A. R., 729.

(70) London & Western Trust Co. *vs* Canada Fire Ins. Co., 13 O. L. R., 540 aff. 16 O. L. R., 217.

The fire first appeared in the cotton. By a condition of the policy the use of the premises for more hazardous purposes avoided the contract. The jury found that the drying of cotton was not a material alteration in the use of the premises, and that the alteration did not increase the risk.

Held that there being evidence that the insured, by the use of the premises for drying cotton increased the risk, the verdict was contrary to the evidence adduced, and a new trial was ordered. (71)

MANUFACTURE OF EXCELSIOR.

A policy on a building described in the application for insurance as a spool factory contained the following conditions: "That in case the above described premises shall at any time during the continuance of this insurance, be appropriated or applied to or used for the purpose of carrying on or exercising therein any trade, business or vocation denominated hazardous or extra hazardous, or for the purpose of storing, using or vending therein any of the goods, articles or merchandise denominated hazardous or extra hazardous unless otherwise specially provided for, or hereafter agreed to by the defendant company in writing or added to or indorsed on this policy, then this policy shall become void. Any change material to the risk, and within the control or knowledge of the assured, shall void the policy as to that part affected thereby, unless the change is promptly notified in writing to the company or local agent."

Held, that the introduction, without notice to the company, of the manufacture of excelsior into the insured premises, in addition to the manufacture of spools, avoided the policy under these conditions, the evidence establishing clearly and there being no evidence to the contrary, that such manufacture in itself was a hazardous, if not an extra hazardous business, notwithstanding that on the trial of the action on the policy the jury found, in

(71) Mooney *vs* Imperial Ins. Co., M. L. R., 3 S. C., 339; 11 L. N., 92.

answer to questions submitted to them, that such additional manufacture was less hazardous than that of spools and did not increase the risk on the premises insured. (72)

ADDING AN INCUMBRANCE.

The 11th plea set up the condition of the policy that if the insured's interest in the property should be changed in any manner, whether by act of the parties or by operation of law, the policy should be void, and alleged that after the issue of the policy the insured mortgaged the property, whereby his interest became changed and the policy voided. It was held that this plea, which was proved, constituted a good defence.

The policy in this case was governed by the Mutual Insurance Companies Act, 36 V., c. 44, but was issued subsequent to the repeal of the section which provided that the policy should be voided in case the property insured was mortgaged except with the consent of the company. (73)

An assent to an assignment of the policy to a mortgagee is an implied assent to the making of the mortgage. (74)

CHANGING THE INSURANCE FROM ONE COMPANY TO ANOTHER DOES NOT VOID THE POLICY.

Vide Condition 8, infra, p. 411.

VACANCY.

If the insured property becomes vacant this is not *per se* a violation of the third statutory condition.

A condition provided that in case the premises became vacant or unoccupied, unless notice thereof was given, and the company consented to retain the risk, the policy should be void. Held,

(72) Sovereign Fire Ins. Co. *vs* Moir, 14 Can. S. C. R., 612.

(73) O'Neill *vs* Ottawa Agricultural Ins. Co., 30 U. C. C. P., 151.

(74) Hazzard *vs* Canada Agricultural Ins. Co., 39 U. C. R., 419, supra. pp. 101, 289.

that the insured had a reasonable time to give notice; that three days was not too long a delay, the property being at Owen Sound and the office of the company at Hamilton; and a fire having occurred on the third day, that the company was bound to pay the policy. (75)

The policy provided that in case of any alteration or addition, etc., or change in the nature of the occupation, or in any other manner whatsoever, by which the degree of risk was increased and a consequent additional premium would be required, the insurance should be void in default of notice and allowance thereof. Held, that a mere ceasing to occupy was not within the condition. (76)

A further condition required occupation of the buildings insured, and provided that the policy should cease to cover any building becoming unoccupied without notice. The buildings insured were a farmhouse and two barns, each insured for a separate amount.

In answer to questions, the jury found *inter alia,* that the house was unoccupied part of the time, and that both barns were continuously occupied.

On argument the plaintiff abandoned his right to recover in respect to the house:—

Held, he could not recover in respect to the barns, the condition requiring continuous occupation of the whole premises. (77)

A policy of insurance against fire upon a dwelling-house contained a condition that if, after the insurance was effected, the risk was increased by any means within the control of the assured, or if the building should, without the assent of the assured, be occupied in any way so as to render the risk more hazardous than at the time of insuring, the insurance should be void.

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(75) Canada Landed Credit Co. *vs* Canada Farmers' Mutual Stock Ins. Co., erroneously reported as Canada Agricultural Ins. Co., 17 Gr., 418.

(76) Gould *vs* British America Ass. Co., 27 U. C. R., 473.

(77) Bishop *vs* Norwich Union Fire Ins. Society, 25 N. S., Rep., 492.

Held, that the assured afterwards ceasing to occupy the house without any fraudulent intent, was not an increase of the risk within the meaning of the condition, unless it was proved that, under the circumstances and situation of the building insured, its destruction by fire was more probable when unoccupied than if the assured had continued to reside in it. (78)

The fact that a dwelling-house is unoccupied is not *per se* a "change material to the risk" within statutory condition 3 in a fire policy on household furniture therein. (79)

BUT A CONDITION LIMITING THE PERIOD DURING WHICH THE PROPERTY MAY REMAIN VACANT, MAY BE ENFORCED.

The insured cannot recover upon a policy which contains a condition, making the contract void if the premises be left unoccupied for more than fifteen days without notice to the company, and it appears that the premises were vacant at the time of the fire and had been so for a much longer time than fifteen days without notice. (80)

The 5th condition of the policy provided that "if the premises become vacant by the removal of the owner or occupants, then and in such case this insurance shall be absolutely void, unless the consent thereto of the company in writing shall have been obtained and endorsed on the policy." The property was vacant a month.

Held, that the premises having become vacant without the knowledge or consent of the company, the policy was avoided. (81)

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(78) Foy *vs* Ætna Ins. Co., 3 All., 29.

(79) Boardman *vs* North Waterloo Ins. Co., 31 O. R., 525.

(80) Cardinal *vs* Dominion, etc., Ins. Co., 3 L. N., 367.

(81) O'Connor *vs* Commercial Union Ins. Co., 3 R. & C., 119. Spahr *vs* North Waterloo Ins. Co., infra, p. 491. Peck *vs* Agricultural Ins. Co., infra, p. 491. McKay *vs* Norwich Union Ins. Co., infra, p. 493.

VACANCY WHERE AGENCY INVOLVED AND THE POLICY DOES NOT EXPRESSLY AUTHORIZE THE AGENT TO RECEIVE NOTICE.

Vide Watertown Ins. Co. *vs* Ansley, supra, p. 281.

VARIATIONS TO CONDITIONS 3, *vide* infra, p. 489.

Condition 4. (Ontario).

"If the property insured is assigned without a written permission indorsed hereon by an agent of the company duly authorized for such purpose, the policy shall thereby become void; but this condition does not apply to change of title by succession or by the operation of the law, or by reason of death." (82)

ASSIGNMENT OF A CLAIM UNDER A POLICY AFTER LOSS IS NOT A BREACH OF THIS CONDITION.

An assignment of a claim to compensation under a fire policy, after the loss has occurred, is not a breach of the ordinary condition against assigning without license of the insurers; but the

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(82) Condition 4. — Corresponding section in the Fire Insurance Policy Acts of the other provinces of Canada:

British Columbia, stat. cond. four: the same as Ontario.

Alberta & Saskatchewan, stat. cond. four: the same as Ontario.

Manitoba, stat. cond. four: the same as Ontario, except:

line 4, *cases where there is a* is inserted before *change.*

line 5, *the* is omitted before *operation.*

Nova Scotia, stat. cond. five: corresponds with no. 4, in Ontario, except:

line 2, *hereon* reads *on the policy.*

line 2, *company* reads *insurer.*

line 5, *the* is omitted.

Condition no. 4 in the Nova Scotia Act reads as follows, and is not contained in the conditions of the other provinces:

"Notwithstanding anything in the contract between the assured and insurer, the question of the materiality of any representation in the application shall be a question for the court and not for the jury."

Compare this with R. S. O. (1897), cap. 203, s. 144, ss. 1a.

safer form of transfer is to assign only the money payable in respect of the loss, and not the policy, especially if the loss be partial only, and less than the sum insured. (83)

ASSIGNMENT OF PART OF THE PROPERTY INSURED VOIDS THE ENTIRE POLICY.

Where a policy of insurance in one sum covers buildings and chattels, and the land upon which the buildings stand is conveyed by deed without the consent of the insurers in breach of the fourth statutory condition, the policy is avoided in toto and does not remain in force as to the chattels. (84)

THIS CONDITION ONLY REFERS TO COMPLETE AND ABSOLUTE ALIENATION.

Held, affirming 26 Gr., 113, that the fourth statutory condition did not apply to an alienation by way of mortgage, but only to an absolute transfer. (85)

The fourth statutory condition provides that if the property insured is assigned without the written permission of the company the policy shall be avoided. Held, affirming 14 O. R., 322, that the assignment meant by this condition is one by which the assignor divests himself of all title and interest. The condition is directed against a change of title, not the creation of an incumbrance, and therefore a mortgage by the person named is not a breach of the condition. Sands *vs* Standard Ins. Co., 26 Gr., 113, 27 Gr., 167, approved. Held also, that an agreement for sale by the mortgagees under their power of sale, which was never carried out by conveyance, was not within the condition. (86)

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(83) Kerr *vs* Hastings Mutual Fire Ins. Co., 41 U. C. R., 217.

(84) Dunlop *vs* Usborne and Hibbert Farmers' Mutual Fire Ins. Co., 22 A. R., 364.

(85) Sands *vs* Standard Ins. Co., 27 Gr., 167.

(86) Bull *vs* North British Canadian Investment Co., 15 A. R., 421.

CHATTEL PROPERTY.

In giving judgment, the court, dealing with this condition said:

"In order to operate as a forfeiture, I think the assignment must divest the assured of all interest in the property, as he would be by change of title, by succession, by operation of law, or by reason of death, which changes are excepted from the operation of the condition, but so long as an insurable interest remains in the assured the policy is valid to the extent of that interest." (87)

A policy of insurance against fire provided that in the event of any sale, transfer or change of title in the property insured the liability of the company should thenceforth cease; that the policy should not be assignable without the consent of the company indorsed thereon; and that all incumbrances effected by the assured must be notified within fifteen days therefrom: Held, that giving a chattel mortgage on the property insured was not a sale or transfer within the meaning of this condition, but it was a "change of title" which avoided the policy. Sovereign Ins. Co. *vs* Peters, 12 Can. S. C. R., 33, distinguished. Held further, that it was an incumbrance even if the condition meant an incumbrance on the policy. (88)

But it has been held with respect to the words "alienation by sale, insolvency or otherwise" in the Mutual Insurance Companies Act, R. S. O., 1877, c. 161, s. 41, which provides by ss. 2 that "where the assignee is a mortgagee the directors may permit the policy to remain in force", the word "alienation" includes a mortgage.

Defendants pleaded that by alienation of the property insured by way of mortgage the policy was avoided under R. S. O., 1877, c. 161, s. 41. Held, that a transfer by way of mortgage came within the Act, and avoided the policy in the hands of the plaintiff as assignee. (89)

(87) Sovereign Fire Ins. Co. *vs* Peters, 12 Can. S. C. R., 33.

(88) Citizens' Ins. Co. *vs* Salterio, 23 Can. S. C. R., 155.

(89) Kanady *vs* Gore District Mutual Fire Ins. Co., 44 U. C. R., 261.

"ALIENATION" IN THE MUTUAL COMPANIES ACT REFERS TO REAL PROPERTY AND NOT CHATTELS.

One of the conditions of a mutual policy provided that, in case of real estate insured and a mortgage given by the insured, the mortgagee might continue his interest by giving notice, etc., and that "whenever any one hereafter insured shall alienate conditionally by mortgage, his policy shall be void", unless written notice thereof be given to the board of directors stating the amount and to whom mortgaged, who should have power to assent or cancel the policy. Held, looking at the constitution and working of mutual insurance companies, that the alienation referred to was of the land on which the premises insured were situate. (90)

The Mutual Insurance Companies Act, (6 Wm. IV., c. 18), provided that the policy should be void where the building should be "alienated by sale or otherwise". As to this Chief Justice Robinson, said:

"That clause appears to me to refer only to such alienations as leave no interest remaining in the person originally insured." (91)

"ALIENATION DOES NOT INCLUDE A LEASE." (92)

Condition 5. (Ontario).

"Where property insured is only partially damaged, no abandonment of the same will be allowed unless by the consent of the company or its agent; and in case of removal of property to escape conflagration, the company will contribute to the loss and expenses attending such act of salvage proportionately to the

(90) Russ *vs* Mutual Fire Ins. Co. of Clinton, 29 U. C. R., 73.

(91) Burton *vs* Gore District Mutual Ins. Co., 14 U. C. R., 342.

(92) Hobson *vs* Wellington Ins. Co., 6 U. C. R., 536.

respective interests of the company or companies and the assured." (93)

A policy contained the following provision:

"In case of the removal of property in order to save it from being burnt this company will contribute rateably with the assured and other companies interested to the expenses of salvage and the damage which the property may sustain by such removal."

It was shown that there was damage by water, breakage, etc., caused by removal and salvage to the extent of $425, but what the expense of the salvage was, or what the damage was to the property which was caused by the removal, the court was unable to say. The defendants claimed an allowance of $200, which, under the circumstances, the court thought not unreasonable. (94)

Where a person insures his house or goods for a *part* only of their value, and suffers a loss equal to the full amount assured, that sum (unless the policy is otherwise specially framed) must be paid by the insurers, and not merely such a proportion of that sum as would correspond with the proportion between the sum insured and the whole value of the property on which the insurance was effected. The condition in the policy that "in

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(93) Condition 5. — Corresponding section in the Fire Insurance Policy Acts of the other provinces of Canada:

British Columbia, Alberta & Saskatchewan, and Manitoba, stat. cond. five: the same as Ontario, except:
line 1, *Where* reads *When*.
line 3, *the* is inserted before *removal*.

Nova Scotia, stat. cond. six: the same as Ontario, except:
line 1, *Where* reads *When*.
line 3, 4, 6, *company* reads *insurer*.
line 3, *the* is inserted before *removal*.
line 4, *conflagration* reads *destruction by fire*.
line 5, *proportionately* reads *ratably*.
line 6, *companies* reads *insurers*.

(94) Kerr *vs* Hastings Ins. Co., 41 U. C. R., 217.

case of the removal of property to escape conflagration the company will contribute ratably with the assured and other companies interested to the loss and expenses attending such act of salvage", is not a condition which will have the effect of changing in this respect the law of partial insurance. (95)

The plaintiff's stock in trade was insured against loss by fire in the defendant company. A fire occurred in an adjoining building and the plaintiff's warehouse being in danger of destruction, he removed his stock, which was thereby damaged and some of it lost. It was held that the plaintiff was entitled to recover under a policy of insurance against fire damages resulting from the *bona fide* efforts to save the insured property. In dealing with the effect of this condition, Burton, J., said:

"I regard the fifth condition not as any exception to or qualification of the risk, but an independent agreement for the benefit of the assurers, and an inducement to the assured to use every exertion to save the property insured, by holding out to him the advantage of being proportionably reimbursed in the expenses he may incur in such removal, the words 'loss or expense attending such act of salvage' having reference, not to the loss or damage to the goods themselves which are already covered by the policy, but to the expenses incurred in the act of salvage.

"I look upon it as an agreement wholly outside of, and in addition to their actual contract of assurance, and although it does not become necessary to decide the point in this case, I may state it as my individual opinion, that the company might be called upon to contribute to such expenses, even although they were also called upon to make good the full amount insured, in other words, in excess of the insurance."

But Patterson, J., said:

"I agree that the appeal must be dismissed. I merely desire to say that I am not prepared to hold that the loss or expense

(95) Thompson *vs* Montreal Ins. Co., 6 U. C. R., 319.

incurred in saving goods can be additional to the amount of the policy.

" Were it necessary to consider the matter, which at present is not the case, there are considerations to the contrary which may perhaps be found of a good deal of weight.

" The company is to contribute *ratably*. What is to be the ratio? Are the companies and the owners to pay in equal shares, or in the ratio of their respective interests in the goods?

" If the latter, or indeed in either alternative, how will it be in a case in which goods to the full amount of the policy or policies are actually destroyed by fire, so that the owner alone is interested in those that are saved?

" Views of this kind would have to be discussed before deciding that the loss or expense incurred in salvage can be added to the amount in respect of which the premium is calculated."

While Galt, J., simply concurred in the result, dismissing the appeal. (96)

Condition 6. (Ontario).

"Money, books of account, securities for money, and evidences of debt or title are not insured." (97)

Condition 7. (Ontario).

"Plate, plate glass, plated ware, jewelry, medals, paintings, sculptures, curiosities, scientific and musical instruments, bullion, works of art, articles of vertu, frescoes, clocks, watches, trinkets and mirrors are not insured unless mentioned in the policy." (98)

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(96) McLaren *vs* Commercial Union Ass. Co., 12 A. R., 279.

(97) Condition 6. — Corresponding section in the Fire Insurance Policy Acts of the other provinces of Canada:

British Columbia, Alberta & Saskatchewan, Manitoba, stat. cond. six, and Nova Scotia, stat. cond. 7: the same as Ontario.

(98) Condition 7. — Corresponding section in the Fire Insurance Policy Acts of the other provinces of Canada:

Condition 8. (Ontario).

"The company is not liable for loss if there is any prior insurance in any other company, unless the company's assent thereto appears herein or is indorsed hereon, nor if any subsequent insurance is effected by any other company, unless and until the company assents thereto, or unless the company does not dissent in writing within two weeks after receiving written notice of the intention or desire to effect the subsequent insurance, or does not dissent in writing after that time and before the subsequent or further insurance is effected." (99)

British Columbia, stat. cond. seven, and Nova Scotia, stat. cond. eight: the same as Ontario.

Alberta & Saskatchewan, stat. cond. seven: the same as Ontario, except:

line 1, *ware* reads *wire*.

Manitoba, stat. cond. seven: the same as Ontario, except:

line 1, *plate glass* is omitted, and inserted in line 4 after *trinkets*.

(99) Condition 8. — Corresponding section in the Fire Insurance Policy Acts in the other provinces of Canada:

British Columbia, stat. cond. eight: the same as Ontario, except:

line 4, *by* reads *in*.

Alberta & Saskatchewan, stat. cond. eight: the same as Ontario, except:

line 4, *by* reads *in*.

line 6, *receiving written* is omitted.

line 7, the following is inserted after the word *insurance*: (*has been mailed to it addressed to it at its principal office in the North-West Territories or at the post office of the agency where the application for insurance was made, by registered letter*), 1903, *2nd session*, *c.* 20, *s.* 2.

Manitoba, stat. cond. eight: the same as Ontario, except:

line 4, *by* reads *in*.

line 6, *receiving written* is omitted.

line 7, *has been mailed to it addressed to its principal office in Manitoba by registered letter* is inserted after *insurance*.

Nova Scotia, stat. cond. nine: the same as Ontario, except:

line 1, 2, 4, 5, *company* reads *insurer*.

line 2, *in* reads *with*.

line 2, *company's* reads *insurer's*.

In the Province of Quebec previous to the Quebec Insurance Act, infra cap. X, there was no corresponding provision to the 8th statutory condition in Ontario which voids the policy for double insurance irrespective of the materiality thereof. In the provinces in which there are no statutory conditions, the effect of double insurance upon the policy depends upon the conditions of the contract.

Where it is a condition of the policy that the total insurance in each item of the property insured shall not exceed two-thirds of the cash value of such item, and that notice shall be given of all previous insurance effected by the insured on the same property, and it appeared that the insurance exceeded two-thirds of the cash value, and that other insurance on two items, to the amount of $100, existed without having been declared to the company, the policy is void. (100)

The fact that an interim receipt had issued for an insurance in another company which insurance was afterwards declined by that company, does not establish a plea of undisclosed insurance. (101)

No form of assent is prescribed by the condition, nor any time at which it is to be given. It, therefore, need not necessarily be manifested in writing and may be given before or after the loss. Where a subsequent insurance has in fact been effected, without notice, notice of it in writing is not a prerequisite to a valid assent. Such notice is necessary only where the insured intends to effect a further insurance thereafter, and to place the company under the obligation to dissent in writing within the prescribed time if they object to it; their failure to do it is equivalent to an assent. (102)

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line 2, *thereto* reads *to such prior insurance.*
line 3, *herein* reads *in the policy.*
line 3, *hereon* reads *thereon.*
line 4, *by* reads *with.*
(100) Pharand *vs* Lancashire Ins. Co., Q. R., 18, S. C., 35.
(101) Western Ass. Co. *vs* Garland, Q. R., 12 K. B., 530.
(102) Mutchmor *vs* Waterloo Ins. Co., 4 O. L. R., 606.

One Mazurette (represented by his assignee, the appellant) effected an insurance on his stock with the respondents, and in the policy there was a condition that insurances elsewhere would make the policy void unless the company received notice of such subsequent insurance. Mazurette failed by some inadvertence to give notice of an insurance effected subsequently in the Commercial Insurance Co. Held, that he could not recover on the policy. (103)

Defendants issued a policy to plaintiffs containing a proviso that it should cease and be of no further effect if the plaintiffs effected any other insurance on same property without notice to defendants. Plaintiffs effected a second insurance, without such notice.

Held, that plaintiffs could not recover. (104)

By a condition of a policy of fire insurance (statutory condition No. 8) the insurance company were not to be liable if any subsequent insurance were effected unless and until the company should assent thereto, etc. A subsequent insurance was effected by the insured, and no notice in writing thereof was given nor any communication made to the company nor to any agent having power to receive such notice, and the fact of the existence of the subsequent insurance was not disclosed to the company until after the insured premises were injured by fire. Held, that the circumstance that the subsequent insurance was effected by a sub-agent of the company's general agent, who had also acted in procuring the prior insurance with the company, should not be regarded as affecting the company with constructive notice of the subsequent insurance. An action upon the policy being dismissed, the company were ordered to refund the last payment of premium, which was received in ignorance that the policy was no longer in force. (105)

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(103) Beausoleil *vs* Canadian Mutual Fire Ins. Co., 1 L. N., 4; 14 R. L., 137.

(104) Campbell et al. *vs* Ætna Ins. Co., Cochran, 21.

(105) Imperial Bank *vs* Royal Ins. Co., 12 O. L. R., 519.

Where a policy was made subject to the conditions indorsed thereon, one of which was "Insurance subsisting or effected with other companies must be notified to the Board, and if approved of, to be indorsed on the policy and signed by the Secretary." Held, that this was a condition precedent, and non-compliance with it a bar to the action, though it did not so expressly provide.

The defendants having proved their plea under this condition, the plaintiff contended that it did not bar the action. Leave was reserved to move for a nonsuit on this ground, and the plaintiff had a verdict, there being another issue on the record.

Another condition provided that property must be insured in the names of the owners. It appeared that the policy was on grain insured in the name of the plaintiff, who had given warehouse receipts for it, indorsed to certain banks. Per Wilson, J. —Such banks were the owners, by virtue of these receipts, not the plaintiff, and the condition was broken. (105)

DOUBLE INSURANCE DOES NOT *per se* VOID THE POLICY IN THE ABSENCE OF A CONDITION TO THAT EFFECT.

En l'absence de convention à cet effet l'assuré n'est pas tenu de dénoncer à l'assureur une deuxième assurance effectuée sur les biens assurés. (107)

SUBSTITUTING ONE POLICY OF INSURANCE FOR ANOTHER IS NOT DOUBLE INSURANCE AND WILL NOT VOID THE POLICY.

The Superior Court, Quebec, held that the mere substitution of one office for another in a case of fire insurance, does not necessitate the giving of notice as in the case of a new or double insurance. (108)

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(106) McBride *vs* Gore District Mutual Fire Ins. Co., 30 U. C. R., 451.

(107) Compagnie d'assurance mutuelle contre le feu de Richmond. Drummond and Yamaska *vs* Fee, 14 Q. L. R., 293; 16 R. L., 461; 11 L. N., 406.

(108) Pacaud *vs* Monarch Ins. Co., 6 R. J. R. Q., 84.

The plaintiff who was insured with defendants, a mutual insurance company, for $2,000, and in other companies with their assent for $8,000, in all for $10,000, on 4th July wrote to defendants, notifying them of changes he had made in his policies with other companies, with a list of the companies he was then insured in, to which defendants' secretary on the 7th July replied that no such notice was necessary so long as the total amount of the insurance was not increased. In June or July defendants' inspector notified the plaintiff that defendants intended reducing his insurance with them by $1,000, to which the plaintiff assented, informing them that he would replace the amount in some other company. On 16th July the insurance was reduced and the unearned premium returned by the local agent, S., with whom the plaintiff effected an insurance for the $1,000 in the Quebec Insurance Company, of which company S. was also agent. Held, that under these circumstances defendants could not set up that this was a further insurance without notice to them. (109)

Held, reversing the judgment of the Court *a quo,* that the condition as to *subsequent* insurance most be construed to point to *further* insurance beyond the amount allowed by the policy, and not to a policy substituted for one of like amount allowed to lapse, and therefore the policy sued upon was not avoided by the non-communication of the $2,000 insurance in The Queen Insurance company. (110)

Held, following Parsons *vs* Standard Ins. Co., 5 Can. S. C. R., 233, that a change in the company in which another insurance has been effected, not increasing the amount insured, did not avoid the policy. (111)

The plaintiff being the owner of a quantity of railway ties and lumber, effected insurance thereon with three companies to the amount of $4,000, and subsequently, with the knowledge and

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(109) Parsons *vs* Victoria Mutual Fire Ins. Co., 29 U. C. C. P., 22.

(110) Parsons *vs* Standard Ins. Co., 5 Can. S. C. R., 233.

(111) Lowson *vs* Canada Farmers Mutual Fire Ins. Co., 6 A. R., 512.

through the agency of H., the person acting on behalf of the several companies, effected an additional insurance of $1,200 on the same property in the Fire Insurance Association. H. acted as agent for that company also and he made the necessary entries thereof on the three first policies. In consequence of the Fire Association having ceased to take risks on that kind of property, H. asked the plaintiff for the interim receipt of that company which he gave up accordingly, and H. substituted one in the Gore District Company for it, he being agent for that company also, but omitted to give any notice or make any entry as to the substitution of the Gore insurance for that of the Fire Association. Held, that this was not such an omission on the part of the plaintiff as invalidated the policies, in this following Parsons *vs* Standard Ins. Co., 43 U. C. R., 603; 4 A. R., 326; 5 Can. S. C. R., 233. (112)

Held, that the fact of there being two prior insurances unassented to was not a breach of statutory condition No. 8, because the evidence shewed the U. policy was to take the place of the R. policy, and of the prior insurances one was assented to on the face of the R. policy and the other had been taken in substitution for another, which also appeared as assented to on the R. policy. It was the duty of the U. company to have properly issued their policy, agreeing to take the position of the R. company, as also it was the duty of the mortgagees to see the policy properly issued. (113)

A policy of insurance on a "grist mill' covers not only the building, but also the fixed and movable machinery in it. The plaintiff effected an insurance in defendants' company on a grist mill. He stated in his application that there were no other insurances on the property, although there was an existing insurance on the fixed and movable machinery in the mill. Held, that the policy was void, as there was a double insurance on the part of the property insured by the defendants; and that they

(112) Moore *vs* Citizens Fire Ins. Co., 14 A. R., 582.

(113) Klein *vs* Union Fire Ins. Co., 3 O. R., 234, supra, pp. 254, 371, 377.

were not estopped from setting up such further insurance by their agent's knowledge of it. Judgment below, 40 U. C. R., 188, reversed. (114)

The notice of additional insurance referred to in C. S. U. C., c. 52, s. 29, cannot be given after the destruction of the goods by fire or a loss upon them to the amount insured, so that the policy has ceased to cover a continuing risk. Where the declaration alleged such a loss: Held, that the defendants, in pleading an additional insurance without notice, might assume the loss to be as alleged, although the plaintiff under the allegation might recover for a partial loss; and if it was in fact only partial, so that the notice might be given after it, the plaintiffs should have replied this. The effect of the statute is not to avoid a condition made by the policy that such notice shall be given forthwith, for, notwithstanding the statute, the parties themselves may make any stipulation on the subject not opposed to it. (115)

By a condition in a policy of insurance against fire the insured was "forthwith" to give notice to the company of any other insurance made, or which might afterwards be made, on the same property and have a memorandum thereof indorsed on the policy, otherwise the policy would be void; provided that if such notice should be given after it issued the company had the option to continue or cancel it.

Held, affirming the judgment of the Supreme Court of New Brunswick, that this condition did not apply to a case in which the application for other insurance was accepted on the day on which the property insured was destroyed by fire and notice of such acceptance did not reach the assured until after the loss.

In this case Mr. Justice Sedgewick, said:

"Secondly, the condition in the policy must be given a reasonable meaning. It cannot mean that a party is bound to give notice of an insurance of which he has not and cannot have any

(114) Shannon *vs* Gore District Mutual Fire Ins. Co., 2 A. R., 396.

(115) Butler *vs* Waterloo County Mutual Fire Ins. Co., 29 U. C. R., 553; but see Soupras *vs* Mutual Fire Ins. Co., 1 L. C. J., 197.

knowledge. Neither can we presume that it was intended to provide for a case where an insurance happened to be effected subsequent to a fire of which the assured was bound to give notice, and that under such circumstances the company should have the option of cancelling the policy. That could not have been the intention of the parties. It could solely have reference to an insurance effected before a fire of which subsequent insurance the assured before the fire could have given notice to the company.

"If it is in the interest of assurance companies that policy holders should give such a notice as that contended for, it will be necessary that the condition be changed so as to compel notice of application for subsequent insurance rather than of the insurance itself.

"We are all of opinion that the appeal should be dismissed with costs." (116)

A policy of insurance against fire contained the following condition: "If the assured have or shall hereafter obtain any other policy or agreement for insurance, whether valid or not, on the property above mentioned, or any part thereof,... this policy shall become void unless consent in writing by the company be endorsed hereon." Held, following the judgment of the Supreme Court of Canada, in Commercial Union Ass. Co. *vs* Temple, 29 S. C. R., 206, that where additional insurance was applied for, but not accepted until after the property insured was destroyed by fire, the condition had no application. A mortgager is the "sole and unconditional owner" of property within the meaning of a condition in a policy of insurance against fire stipulating that the policy shall become void if the assured is not the sole and unconditional owner of the property insured. The policy also contained a condition that it should become void if any building intended to be insured stood on grounds not owned in fee simple by the assured. The land upon which the buildings insured stood was subject to a mortgage. Held, that

(116) Commercial Union Ass. Co. *vs* Temple, 29 Can. S. C. R., 206.

the defence that the lands were not owned in fee simple by the assured mortgagor was not available under a plea charging that the plaintiff had been guilty of misrepresentation in the application for insurance, in that he stated that the property insured was not mortgaged or otherwise encumbered, whereas, etc., it was mortgaged. (117)

INTERIM RECEIPT. — EFFECT OF DOUBLE INSURANCE.

The plaintiff was a judgment creditor of one Limoges insured under an interim receipt which provided that it was subject to the conditions of the fire insurance policies of the Company, and on the same day and three days before the fire obtained an additional insurance in another company. When getting the receipt Limoges demanded a policy but the agent of the Company told him that for short insurances the Company never gave policies.

In the judgment of the majority of the Court given by Cross, J., it is said:

"As the fire which consumed the premises insured took place on the 31st August, and almost immediately afterwards notice of the other insurance was given, it may be said that, within a reasonable time, Limoges had, as far as possible on his part, complied with the condition in question, but evidently the compliance indicated by the policy was such as would lead to an endorsement thereof by the Company on the policy, or have it otherwise by them acknowledged in writing. Now if no policy was issued in either case, Limoges could not satisfactorily communicate to the Citizens' Insurance Company the particulars of his contract with the Royal, nor have such notice endorsed on the policy of the Citizens' Company. If it was reasonable for the Citizens' Insurance Company to refuse their policy for a short risk, it was equally reasonable for the Royal to refuse their policy—without it no satisfactory particulars could have been com-

(117) Temple *vs* Western Ass. Co., 35 N. B. Rep., 171.

municated to the Citizens', and without the policy of the Citizens' there could have been no endorsement on it of the insurance effected with the Royal.

"It seems to me that the refusal by the Citizens' Insurance Company to deliver a policy to Limoges for the risk they assumed, was equivalent to an acknowledgment on their part that the condition in question could not attach, and, if it could attach, the refusal to deliver the policy operated a waiver of the condition, and that the Company are now estopped from availing themselves of a condition they themselves stood in the way of being fulfilled."

In the *considérants* of the judgment it is said:

"And considering that if the said François Xavier Limoges was under any obligation in respect of such notice and allowance, it was thereby suspended and waived until such policy should be delivered to him, which was not done;

"And considering that upon delivery to him of a policy containing said condition he was entitled to a reasonable delay to give to the said Citizens' Insurance Company said notice, and get their said allowance in writing." (118)

THE NOTICE OF THE SUBSEQUENT INSURANCE MUST BE DEFINITE ENOUGH TO PERMIT OF THE COMPANY CONSIDERING ITS EFFECT UPON THEIR PRIOR INSURANCE.

To an action on a fire policy in a mutual insurance company, the defendants set up as a defence the eighth statutory condition, that the company were not to be liable for any loss "if any subsequent insurance be effected in any other company, unless and until the company assents thereto by writing, signed by a duly authorized agent." By 44 V., c. 20, s. 28, (O), the Fire Insurance Policy Act is made applicable to mutual fire companies, except where the provisions of the Mutual Act are inconsistent with, or supplementary, or in addition thereto. Section 39

(118) Lafleur *vs* Citizens Ins. Co., 22 L. C. J., 247.

of the Mutual Act (119) enacts in substance, that if a double insurance subsists in defendants' company and another company, the defendants' policy should be void, unless such double insurance subsists with the directors' assent indorsed on the policy, signed by the secretary, etc., or otherwise acknowledged in writing; and s. 40, that whenever the company receives notification in writing of an additional sum being insured on the same property in another company, the same shall be deemed assented to unless the company within two weeks after the receipt of such notice signify their dissent in writing. The defendants' policy was effected on the 31st July, 1884. On 4th January, 1886, the plaintiff effected a further insurance in another company for $1,000. On 8th March, 1886, the plaintiff wrote defendants: "I hereby notify you that I have put a second insurance on my stock and farm implements." On 10th March the defendants replied, informing plaintiff that he had not "given the number of the policy or the amount of the insurance, or the name of the company." The plaintiff did not reply to this, because, as he said, he was away from home. The loss occurred on the 16th March. The jury found that the plaintiff did not, within a reasonable time after effecting the further insurance, notify the defendants; but that the notice was reasonably sufficient as far as he knew. Held, that under s. 39, the insurance was void; and that under the circumstances, there could be no implied assent under s. 40; and further, that the notice was not sufficient. (120)

Where the notice wrongly gave the name of the company in which the subsequent insurance was effected, and in error also stated the subsequent insurance to be larger than it really was, and this notice was duly received by the company, it was held, that inasmuch as defendants were neither prejudiced nor misled by the mistake, and no fraud appeared or was alleged in so giving the notice, the policy was not thereby vitiated. (121)

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(119) R. S. O., (1877), cap. 161.

(120) Graham *vs* London Mutual Fire Ins. Co., 13 O. R., 132.

(121) Osser *vs* Provincial Ins. Co., 12 U. C. C. P., 133.

DOUBLE INSURANCE WHERE THE INSURED PROPERTY HAS BEEN ASSIGNED OR TRANSFERRED TO A THIRD PARTY.

Further insurance effected by an assignee of the property insured without knowledge of prior insurance by the assignor, will void the first policy.

Second plea: that by one of the conditions the renewal policies became avoided if insured or his assigns should effect any further insurance, and should not with reasonable diligence notify the company and have it indorsed; that the plaintiff became assignee before the fire of B's estate and effects, including this property and policy, and then effected a further insurance in the Western Assurance Co.; and that neither he nor B. gave notice, etc., whereby the policy was avoided. Held, plea good, for the plaintiff was B's assignee within the policy, and as such became possessed of B's policy for the benefit of the estate, and in such interest effected the second insurance. An equitable replication to this plea alleged that when the plaintiff effected the further insurance, he was ignorant of this insurance by B.; that as soon as he became aware thereof, he, with all reasonable diligence, notified defendants, and by their default it has not been indorsed. Held, bad, for the assignee's ignorance could not deprive defendants of the benefit of their express stipulation. (122)

An insurance effected by a mortgage creditor, with the knowledge of the debtor, will void a prior policy made by the latter in his own favour, if there is a condition against double insurance.

Une police d'assurance qui contient une condition obligeant l'assuré à donner avis à la compagnie de toute autre assurance sur les mêmes propriétés, sous peine de nullité, sera déclarée nulle si l'assuré a connaissance d'une assurance prise sur les mêmes propriétés par un créancier hypothécaire, et n'en donne pas avis à la compagnie. (123)

Section 28 of C. S. U. C., c. 52, (infra, p. 504), makes a pol-

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(122) Dickson *vs* Provincial Ins. Co., 24 U. C. C. P., 157.

(123) Picard *vs* British American Ass. Co., 14 R. L., 136, 318; M. L. R., 2 S. C., 117; 9 L. N., 134.

Vide also Coleman *vs* Economical Mutual, 4 O. W. R., 466.

icy voidable "if insurance on any house or building subsists in the company and in any other office, or by any other person at the same time", without the consent of the company; and it was a condition of the policy that a further insurance by the plaintiff, or any other person, should render the policy void.

It was held that the further insurance "by the plaintiffs or any other person" referred to in the condition cannot possibly mean, by the words "any other person", a perfect stranger to the plaintiffs and to the property, a person having power to destroy the rights of others, and who is in no way in privity with the plaintiffs.

A further insurance must mean by the same person or in the same interest as the person who has before insured.

Separate insurances by persons having different interests in the same property cannot benefit the parties, nor can they harm the insurers.

One of the persons insured may be a tenant for twenty years. The other may have the immediate reversion in fee.

Each can only recover a compensation for and in respect of his own interest; he neither gains or loses by what the other may do with respect to his interest. (124)

Double insurance by mortgagor or mortgagee.

It has been held in Burton *vs* Gore District Mutual Ins. Co., 12 Gr., 156, that subsequent insurance by the mortgagor will not make void a prior policy on the same property made by the mortgagor and assigned to the mortgagee, but as has been pointed out, supra, p. 89, it is submitted that the authority of this decision has been impaired by later judgments and cannot be relied on except possibly in the Province of Ontario. (125)

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(124) Gilchrist *vs* Gore District Mutual Ins. Co., 34 U. C. R., 15.

(125) *Vide* Mechanic's Building & Savings Society *vs* Gore District Mutual Fire Ins. Co., 40 U. C. R., 220; 3 A. R., 151, supra, p. 89, Smith *vs* Niagara District Mutual Ins. C., 38 U. C. R., 570, supra, p. 91, 92.

Where a mortgagee has the right to insure as collateral security to his mortgage, under a covenant therein contained, it has been held by the Supreme Court of New Brunswick that any insurance so effected will void a prior insurance made by the mortgagor.

A policy of insurance on a mortgaged property contained a condition that the insured should give notice of any other insurance already made, or which should afterwards be made elsewhere on the same property, whether valid or not valid, and whether concurrent or otherwise, so that a memorandum of such insurance might be indorsed on the policy. The mortgagee, without such notice or indorsement, effected another insurance with another company in the name of the plaintiff's wife, with the loss, if any, payable to himself as his interest might appear.

Held, that the mortgagee's insurance, without the notice and indorsement voided the plaintiff's insurance.

In this case Barker, J., said:

"It is, I think, immaterial, in a case like this, whether the plaintiff, in fact, knew of the second insurance or not. He knew that he had covenanted to insure for the benefit of the mortgagee, and that he had not done so. He also knew that in that event the mortgagee has his and his wife's authority to insure the owner's interest, to charge the premiums to them, and that the mortgagee was authorized to pay himself out of the insurance moneys, and bound to account to them for any surplus." (126)

But the contrary has been held to be the law in Ontario. (127)

Where the second insurance is of doubtful validity.

In Ontario, by a long line of decisions, it has been held that a subsequent insurance, the validity of which may be disputed

(126) Perry *vs* Liverpool and London and Globe Ins. Co., 34 N. B. Rep., 380.

(127) Sauvey *vs* Isolated Risk Ins. Co., 44 U. C. R., 523.

by the Company, is nevertheless a double insurance which avoids a prior policy which contains a condition against double insurance.

SECOND INSURANCE BY INTERIM RECEIPT.

One of the conditions of an insurance policy was, that if there should be any insurance at any other office notice should be given, and the same indorsed on or stated in the policy, otherwise the first insurance should be void.

Held, that an insurance effected in another office by an interim receipt, was an insurance within the condition; but as there was some evidence of a waiver of the notice required, which defendant could not take advantage of under his replication, the court, instead of ordering a nonsuit on the leave reserved, granted a new trial with leave to amend. (128)

It was a condition that if the insured should make any other insurance on the same property and should not notify defendants, the policy should cease. It appeared that shortly before the fire the insured made an application to the Provincial Ins. Co. for a further insurance of $1,000 and obtained an interim receipt therefor. The validity of this receipt was disputed, but the plaintiff had taken proceedings in chancery to compel the company to issue a policy; and had, in his proofs of loss sworn to this additional insurance. Held, an insurance of which notice was required. (129)

FURTHER INSURANCE ON PART.

One of the conditions of a mutual policy was "that in case insurance shall subsist or be effected on the premises or property insured by the company in any other office, or from, by or with any other person or persons, during the continuance of such insurance, the policy granted thereon by the company shall be void,

(128) Hatton *vs* Beacon Ins. Co., 16 U. C. R., 316.
(129) Mason *vs* Andes Ins. Co., 23 U. C. C. P., 37.

unless such double insurance subsist with the consent of the directors, signified by indorsement on the back of the policy, signed by the president and secretary." It appeared by the pleadings that three separate sums were insured—on a building, on the machinery, and on the stock in it; and a second insurance, without the consent of the company, was effected on the building and machinery. Held, that by the condition, and by the statute under which these companies are incorporated, the policy was altogether avoided, and not merely as to the property so doubly insured. Held, also, that it was immaterial that such second insurance was with a foreign company, and therefore not capable of being enforced here, for the condition intends an insurance in fact. (130)

NOTICE OF DOUBLE INSURANCE AFTER THE LOSS.

Besides the provision of C. S. U. C., c. 52, s. 28, (supra, p. 422), the policy provided that in case of insurance with other companies, notice must be given to defendants, and their approval indorsed on the policy; and the passing of a resolution avoiding the policy and mailing a copy addressed to the assured, should avoid the same. After the issue of the policy in question, the plaintiff obtained from another company an interim receipt, by which they considered themselves bound until they should repudiate the risk. No notice was given to defendants of this further assurance until they received from plaintiff his statement and affidavit after the fire, when he swore to the existence of it, and on the second day after this defendants mailed to him a copy of their resolution avoiding his policy. It appeared, also, that the plaintiff had made a claim against the other company. Held, that the plaintiff having effected an insurance with another company, which from all that appeared was binding upon them, and having failed to notify defendants thereof,

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(130) **Ramsay Woollen Cloth Manufacturing Co. *vs* Mutual Fire Co. of the District of Johnstown, 11 U. C. R., 516.**

defendants were not liable under their policy, which they had the right to avoid even after the fire. (131)

The plaintiff, an illiterate man, being informed by the agent of the Mercantile Co. that his policy in the defendant company had expired, insured in the Mercantile Co., but not having the money gave his note for it. After the fire plaintiff was told by the agent of the Mercantile Co. that the defendants insurance had not expired, and it was then agreed to withdraw the application in the Mercantile as made in error, and gave up plaintiff's interim receipt. It was held that the condition was nevertheless broken and the plaintiff could not recover, and that the question of the liability or nonliability of the Mercantile Co. could not in the action against the defendant Co. be discussed, approving the opinion to the same effect in Mason *vs* Andes Insurance Co., 23, U. C. C. P., 37. (132)

Previous to the application for insurance in the defendant company, an application had been made to the Phœnix Ins. Co., for insurance, which resulted in an interim receipt being given the insured good for 30 days unless the application was approved by the directors, and the question for adjudication was whether there was such approval. The Court of first instance held that the temporary provisional insurance did not subsist at the date of the application to the defendants, but the Court of Appeal reversed this, saying:

"The point for adjudication then is, whether there was such approval. It is properly conceded that this issue is precisely the same as if an action were in course of trial against the Phœnix. Adopting that test, it appears to us that that company would be fixed with liability, and that, therefore, the ground that this insurance was not in force, which was the only answer made by the defendants to this objection, was removed. Mr. Crossin, the agent of the company, said, that he did not know that the application had not been accepted. But if any person could shew

(131) Bruce *vs* Gore District Mutual Ins. Co., 20 U. C. C. P., 207.
(132) Gauthier *vs* Waterloo, 44 U. C. R., 490

that the board had not approved of this risk, it ought to be Mr. Brandon, the managing director. The material parts of his evidence are as follows: It is the practice of the company to notify within thirty days, if they do not intend to accept, but he can find no trace of any such notification to Brodie. He thought that the application was accepted; that was his impression; he had no doubt it went through; he had no doubt in his own mind it was accepted. We think that, without more, this would be sufficient evidence as against the company to establish an approval, and that that alone would constitute a valid insurance for three years." (133)

THE JURISPRUDENCE IN ONTARIO DOES NOT PREVAIL IN NEW BRUNSWICK WITH RESPECT TO THE EFFECT OF SUBSEQUENT INSURANCE OF DOUBTFUL VALIDITY.

A condition of a policy of insurance was, that if the assured should have any other insurance on the property, not notified to the insurers and indorsed on the policy, the insurance should be void. At the time of insuring his house with the defendants, the plaintiff had an insurance thereon in the name of M., in an office in the State of Maine:—

Held, that as by the law of this country, neither the plaintiff nor M. could recover on that policy, the defendants, in order to avoid their policy for want of notice of the previous insurance, should have shewn that by the law of Maine the plaintiff could recover on the policy effected by M. (134)

NOR IN QUEBEC.

The fact that an interim receipt had issued for an insurance in another company, which insurance was afterwards declined by that company, does not establish a plea of undisclosed insurance. (135)

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(133) Greet *vs* Citizens Ins. Co., 5 A. R., 596.
(134) McLachlan *vs* Ætna Ins. Co., 4 All., 173.
(135) Western Ass. Co. *vs* Garland, Q. R., 12 Q. B., 530.

JURISPRUDENCE ON THIS POINT IN THE PRIVY COUNCIL.

In the judgment of the committee in a recent case it was said:

"This is an appeal from a judgment of His Majesty's Supreme Court for China and Corea, at Shanghai, dated July 8, 1905. The action was brought by the respondents upon two policies of insurance against fire, dated respectively October 1, 1904, and November 14, 1904, effected by them with the appellant company upon stock in trade and other goods in a shop belonging to the respondents in Shanghai. The appellants denied their liability on two grounds, the first of which only was raised and argued before their Lordships. That ground of defence was that the policies had become null and void by reason of the respondents having omitted to give the appellant company notice of an additional insurance effected by the respondent with the Western Assurance Company, without the consent of the appellant company, on the same goods. The respondents denied that there was, at the date of the fire, or ever had been, any effective insurance with the Western Assurance Company. The learned judge who tried the action gave judgment for the respondents.

"The policies sued on were in the same form. They both contained a clause in Chinese characters immediately following the operative part of the policy in these words: 'No additional insurance on the property hereby covered is allowed except by the consent of this company indorsed hereon. Breach of this condition will render this policy null and void.'

"And one of the conditions indorsed on the policies was as follows: '12. The insured must, at the time of effecting the insurance, give notice to the company of any insurance or insurances already made elsewhere on the property hereby insured or any part thereof, and on effecting any insurance or insurances during the currency of this policy elsewhere on the property hereby insured, or any part thereof, the insured must also forthwith give notice to the company thereof, so that the particulars thereof may be indorsed on the policy, and unless such notice be given, the insured will not be entitled to any benefit under this

policy, and on the happening of any loss or damage, the insured shall forthwith declare in writing, to the company, all other insurances effected by him, or by any other person, on any of the property, and the giving of such notices at the respective times aforesaid shall be a condition precedent to the recovery of any claim under this policy.'

"The fire took place on December 5, 1904. Prior to that date a policy, dated December 1, 1904, had been executed by the directors of the Western Company in favour of the respondents for 3,000 taels. This policy was found in the respondents' safe after the fire, but the premium on it was never paid...

"The question, therefore, is whether, the premium not having been paid either wholly or partially, the policy executed by the Western Assurance Company ever became effective, and this must be decided in the same way as if an action had been brought by the respondents on that policy. The Western Company, it should be said, always repudiated any liability, and the respondents, of course, did not seek to enforce it...

"Their Lordships cannot treat the fact of the executed policy having been handed to the respondents as a waiver of the condition or attach any importance to the circumstance. What was handed to the respondents was the instrument with this clause in it, and that was notice to them, and made it part of the contract that there would be no liability until the premium was paid. It is not a question of conditional execution, but of the construction of what was executed." (136)

The appeal was accordingly dismissed.

DOUBLE INSURANCE.

WAIVER, ESTOPPEL OR AGENCY INVOLVED.

Vide McCrae *vs* Waterloo Ins. Co., supra, p. 321.
Hendrickson *vs* Queen Ins. Co., supra, p. 324.
Jacob *vs* Equitable Ins. Co., supra, 150.
Lyons *vs* Globe Ins. Co., supra, p. 168.
Western Ass. Co. *vs* Doull, supra, p. 177.

(136) Equitable Fire & Accident Office *vs* Ching Wo Hong, (1907), A. C., 96.

Condition 9. (Ontario).

"In the event of any other insurance on the property herein described having been assented to as aforesaid, then this company shall, if such other insurance remains in force, on the happening of any loss or damage, only be liable for the payment of a rateable proportion of such loss or damage without reference to the dates of the different policies." (137)

PROVISIONS OF THE QUEBEC CODE.

"Art. 2516. If there be several contracts of insurance effected without fraud upon the same object, and against the same risks, and the first contract insures the full value of the object, it alone can be enforced.

"The subsequent insurers are free from liability and are bound to return the premium, reserving a half per cent.

"Subject nevertheless to such special agreement and conditions as may be contained in the policies of insurance."

"Art. 2517. When in the case specified in the last preceding article the total value of the object is not insured by the first contract, the subsequent insurers are liable for the surplus according to the date of their respective contracts; subject to the same restriction."

"Art. 2519. When there is a partial loss of an object insured by several insurances to an amount not exceeding its full value, the insurers are liable for it rateably in proportion to the sums for which they have respectively insured."

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(137) Condition 9. — Corresponding section in the Fire Insurance Policy Acts of the other provinces of Canada:

British Columbia and Manitoba, stat. cond. nine: the same as Ontario.

Alberta & Saskatchewan, stat. cond. nine: the same as Ontario, except:

line 5, *proportion* reads *portion*.

Nova Scotia, stat. cond. ten: the same as Ontario, except:

line 1, 2, *herein described* reads *described in the policy*.

line 2, 3, *company* reads *insurer*.

The plaintiff had insured his building against fire in two different companies in separate amounts for the front and rear portions, and the whole building, without division, in a third company. A fire took place, damaging both front and rear, nearly all the injury being done to the rear. Held, that the proper method of ascertaining the relative amounts payable by the different companies was to add the amount of all policies together without reference to the division of the risks, and that each company was liable for its relative proportion to the whole amount insured. (138)

Plaintiff insured with defendants $2,000 on a building, and $2,000 on the building and furniture together; and a loss occurred of $1,050 on the building, and $878 on the furniture. Defendants' policy provided that in case of loss, the assured should recover from them only such portion thereof as the amount assured by them should bear to the whole amount assured; and, under this, they contended that the other insurance must be treated as one for $2,000 on the building, and $2,000 on the furniture, so that they would be liable only for one-half of the loss on each; but, Held, that as the whole amount insured was $6,000 of which defendants had taken $4,000 they were liable for two-thirds of the loss. (139)

VARIATIONS TO THIS CONDITION. — *Vide* infra, p. 493.

Condition 10. (Ontario).

"The company is not liable for the losses following, that is to say:

"(a) For the loss of property owned by any other party than the assured, unless the interest of the assured is stated in or upon the policy;

"(b) For loss caused by invasion, insurrection, riot, civil commotion, military or usurped power;

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(138) McCausland *vs* Quebec Fire Ins. Co., 25 O. R., 330.

(139) Trustees of the First Unitarian Congregation of Toronto *vs* Western Ass. Co., 26 U. C. R., 175.

Vide also Davidson *vs* Insurance Co., 2 O. W. R., 621.

"(c) Where the insurance is upon buildings or their contents, for loss caused by the want of good and substantial brick or stone chimneys; or by ashes or embers being deposited, with the knowledge and consent of the assured, in wooden vessels; or by stoves or stovepipes being, to the knowledge of the assured, in an unsafe condition or improperly secured;

"(d) For loss or damage to goods destroyed or damaged while undergoing any process in or by which the application of fire heat is necessary;

"(e) For loss or damage occurring to buildings or to their contents while the buildings are being repaired by carpenters, joiners, plasterers or other workmen, and in consequence thereof, unless permission to execute such repairs has been previously granted in writing, signed by a duly authorized agent of the company. But in dwelling-houses fifteen days are allowed in each year for incidental repairs, without such permission;

"(f) For loss or damage occurring while petroleum, or rock-earth or coal-oil, camphene, gasoline, burning fluid, benzine, naphtha or any liquid products thereof, or any of their constituent parts (refined coal oil for lighting purposes only, not exceeding five gallons in quantity, or lubricating oil not being crude petroleum nor oil of less specific gravity than required by law for illuminating purposes, not exceeding five gallons in quantity, excepted), or more than twenty-five pounds weight of gunpowder is or are stored or kept in the building insured or containing the property insured, unless permission is given in writing by the company." (140)

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(140) Condition 10. — Corresponding section in the Fire Insurance Policy Acts of the other provinces of Canada:

British Columbia, stat. cond. ten: the same as Ontario, except:
10 (a) line 1, *the* is omitted.
10 (c) line 6, 1895, *c.* 22, *s.* 2, is inserted at end.
10 (e) line 1, *to* is omitted before *their*.
10 (f) line 1, 2, *rock-earth* reads *rock, earth*.
line 5, 7, *five* reads *twenty*.

10 (a).

The plaintiffs having an insurable interest as lessees in machinery applied verbally to the defendant's agent for insurance to whom they communicated the state of the title, the name of the owners, and the nature of their interest in the machines. The agents had authority to accept the risk, receive the premium and issue an interim receipt, which they did. They also partly filled up an application form, not containing any statement as to the nature of the ownership and signed it in the name of the plaintiffs, but without the knowledge, consent or authority of the latter. A policy was issued and sent to the plaintiffs, which contained the statement that "the property is being held by the assured as owners." Statutory condition 10 provides that the company is not liable for loss of property owned by any other party than the assured, unless the interest of the

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Alberta & Saskatchewan, stat. cond. ten: the same as Ontario, except:

10 (a) line 1, *the* is omitted.

10 (e) line 1, *to* is omitted before *their*.

line 4, *has* reads *had*.

Manitoba, stat. cond. ten: the same as Ontario, except:

10 (a) line 1, *the* is omitted.

10 (b) line 2, *or* is inserted before *military*.

10 (c) line 2, 3, *the want of good and substantial brick or stone chimneys; or by*, is omitted.

10 (e) line 1, *to* is omitted before *their*.

line 4, *has* reads *had*.

10 (f) line 1, *or* is omitted before *rock*.

line 1, 2, *rock-earth* reads *rock, earth*.

Nova Scotia, stat. cond. eleven: the same as Ontario, except:

10 line 1, *company* reads *insurer*.

10 (a) line 1, *the* is omitted.

line 1, *party* reads *person*.

10 (e) line 1, *to* is omitted before *their*.

line 6, *company* reads *insurer*.

line 7, *any* is inserted before *such*.

10 (f) line 1, 2, *rock-earth* reads *rock, earth*.

line 11, *company* reads *insurer*.

assured is stated in or upon the policy. Held, that plaintiffs were not precluded from recovery by this condition inasmuch as the defendants had notice through their agents of the real interest of the plaintiffs, and it was their duty to have indorsed on the policy the necessary statement as to it, or at all events they were estopped from setting up the condition. (141)

Where the business of a partnership is taken over by a limited liability company, formed for that purpose, there is such a change of interest as to invalidate insurances held by the firm in the absence of notification of the change to, and assent by, the insurance company, though the members of the partnership hold nearly all the stock in the limited liability company. (142)

10 (c) CHIMNEY.

In his application the plaintiff untruly represented the building as furnished with a brick chimney. Held, that on this account the policy never attached, and that the plaintiff therefore might recover back his premium. (143)

ASHES.

La condition contenue dans une police d'assurance contre le feu, de ne garder ni chaux ni cendres dans des vaisseaux de bois dans ou près des bâtisses assurées, n'est pas violée par le fait que l'assuré dépose des cendres froides dans ces bâtisses. (144)

10 (f) LUBRICATING OIL.

One of the conditions of the policy was that the company should not be liable for any loss occurring while petroleum, rock earth or coal oil, burning fluid, naphtha or any liquid product

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(141) Davidson *vs* Waterloo Mutual Ins. Co., 9 O. L. R., 394.
(142) Peuchen *vs* City Mutual Fire Ins. Co., 18 A. R., 446.
(143) Mulvey *vs* Gore District Mutual Ins. Co., 25 U. C. R., 424.
(144) Cie d'Ass. de Montmagny *vs* Carbonneau, 16 R. L., 275; 15 Q. L. R., 86.

thereof or any of their constituent parts were stored or kept on the property insured. Held, affirming the judgment of the court below, that the fact of there being a small quantity—about a gallon, in two small cans—of lubricating oil, used for the purpose of lubricating the engine, was not such a storing of oil, etc., as was contemplated by the condition. (145)

Condition 11. (Ontario).

"The company will make good loss caused by the explosion of coal gas in a building not forming part of gas works, and loss by fire caused by any other explosion or by lightning." (146)

LOSS BY EXPLOSION.

A policy of insurance against fire contained a condition that "the company will make good a loss caused by the explosion of coal gas in a building not forming part of gas works, and loss by fire caused by any other explosion, or by lightning." A loss occurred by the dropping of a match into a keg of gunpowder on the premises insured, the damage being partly occasioned by the explosion of the gunpowder, and partly by the gunpowder setting fire to the stock insured. The company admitted their liability for the damage caused by fire, but not for that caused by the explosion.

Held, reversing 7 O. R., 634, 8 O. R., 343, 11 A. R., 741, that the company were not exempt by the condition in the policy from liability for damage caused by the explosion. (147)

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(145) Mitchell *vs* City of London Ins. Co., 15 A. R., 262.

Vide also Thompson *vs* Equity Fire Ins. Co., 10 O. W. R., 761.

(146) Condition 11. — Corresponding section in the Fire Insurance Policy Acts of the other provinces of Canada:

British Columbia, Alberta & Saskatchewan, and Manitoba, stat. cond. eleven: the same as Ontario.

Nova Scotia, stat. cond. twelve: the same as Ontario, except:

line 1, *company* reads *insurer*.

(147) Hobbs *vs* Northern Ass. Co., 12 Can. S. C. R., 631.

Condition 12. (Ontario).

"Proof of loss must be made by the assured, although the loss be payable to a third party." (148)

Previous to the statute which made choses in action assignable at law, it was held in a case where both the insured property and the policy had been assigned to the plaintiff with the consent of the company that the assignee could not sue in his own name. (149)

The Mutual Insurance Companies Act provided that "in case of any loss or damage by fire happening to any member upon property insured with the company, such member shall give notice thereof to the Secretary of the company within 30 days", etc.

It was held that a mortgagee to whom a policy of insurance in a Mutual Company is assigned, as collateral security, cannot give the notice of a loss and proofs required by the condition of the policy, and an action brought by him in default of compliance by the assured with this condition must fail in view of the special provisions of the Mutual Insurance Companies Act. (150)

In absence of a statutory condition it was held in New Brunswick that an assignee of both the insured property and the policy, may give notice and make proofs if the assignment is assented to by the company.

A policy provided that "persons insured sustaining any loss or damage by fire are forthwith to give notice to the company", etc. The insured sold the property to B., and assigned the policy with the assent of the company to B. The latter subsequently assigned the property and policy to C. as collateral security for a loan. The Company assented to the assignment of the pol-

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(148) Condition 12. — Corresponding section in the Fire Insurance Policy Acts of the other provinces of Canada:

British Columbia, Alberta & Saskatchewan and Manitoba, stat. cond. twelve: the same as Ontario.

Nova Scotia, stat. cond. thirteen: the same as Ontario, except: line 2, *be* reads *is*.

(149) Beemer *vs* Anchor Ins. Co., 16 U. C. R., 485.

(150) Fitzgerald *vs* Gore District Mutual Ins. Co., 30 U. C. R., 97.

icy but was not aware that the assignment was by way of security only. It was held that the proofs of loss were properly made by B. and that the absence of notice to the company as to the nature of the assignment did not discharge them. (151)

PROOFS OF LOSS BY A MEMBER OF A PARTNERSHIP.

Where, after the loss by fire, one partner assigns to the other partner all his interest in a policy of insurance taken out in the partnership name, it will be sufficient if the partner to whom the policy has been assigned alone makes the proofs of loss. (152)

Condition 13. (Ontario).

"Any person entitled to make a claim under this policy is to observe the following directions:

"(a) He is forthwith after loss to give notice in writing to the company;

"(b) He is to deliver, as soon after as practicable, as particular an account of the loss as the nature of the case permits;

"(c) He is also to furnish therewith a statutory declaration declaring:

"That the said account is just and true;

"When and how the fire originated, so far as the declarant knows or believes;

"That the fire was not caused through his wilful act or neglect, procurement, means or contrivance;

"The amount of other insurances;

"All liens and incumbrances on the subject of insurance;

"The place where the property insured, if movable, was deposited at the time of the fire;

"(d) He is in support of his claims, if required, and if practicable, to produce books of account, warehouse receipts and

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(151) Stevens *vs* Queen Ins. Co., 32 N. B. Rep., 387.

(152) Hutchinson *vs* Niagara District Ins. Co., 39 U. C. R., 483.

stock lists, and furnish invoices and other vouchers; to furnish copies of the written portion of all policies, to separate as far as reasonably may be the damaged from the undamaged goods, and to exhibit for examination all that remains of the property which was covered by the policy;

"(e) He is to produce, if required, a certificate under the hand of a magistrate, notary public, commissioner for taking affidavits or municipal clerk, residing in the vicinity in which the fire happened, and not concerned in the loss or related to the assured or sufferers, stating that he has examined the circumstances attending the fire, loss or damage alleged, that he is acquainted with the character and circumstances of the assured or claimant, and that he verily believes that the assured has by misfortune and without fraud or evil practice sustained loss and damage on the subject assured to the amount certified." (153)

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(153) Condition 13. — Corresponding section in the Fire Insurance Policy Acts of the other provinces of Canada:

British Columbia, stat. cond. thirteen: the same as Ontario, except:

13 (b) line 1, *after* reads *afterwards*.

13 (c) Subdivisions are numbered (1), (2), (3), (4), (5) & (6) respectively.

(c) (2) line 1, *so* reads *as*.

13 (e) line 2, *Government agent* is inserted before *magistrate*.

Alberta & Saskatchewan, stat. cond. thirteen: the same as Ontario, except:

13 (b) line 1, *after* reads *afterwards*.

13 (c) Subdivisions are numbered (1), (2), (3), (4), (5) & (6) respectively.

13 (d) line 2, 3, *warehouse receipts and stock lists* is omitted.
line 4, 5, *to separate as far as reasonably may be the damaged from the undamaged goods*, is omitted.
line 7, 1903, *2nd. session, c. 20, s. 3*, is inserted at the end.

13 (e) line 2, *magistrate* reads *justice of the peace*.
line 2, *or* is inserted before *commissioner*.
line 3, *or municipal clerk* is omitted.

Manitoba, stat. cond. thirteen: the same as Ontario, except:

13 line 2, *directions* reads *conditions*.

13 (b) line 1, *after* reads *afterwards*.

ARTICLES OF CODE IN QUEBEC.

"Art. 2478. In case of loss the insured must, with reasonable diligence give notice thereof to the insurer; and he must conform to such special requirements as may be contained in the policy with respect to notice and preliminary proof of his claim, unless they are waived by the insurer.

"If it be impossible for the insured to give notice or to make the preliminary proof within the delay specified in the policy, he is entitled to a reasonable extension of time."

"Art. 2575. The sum insured does not constitute any proof of the value of the object of the insurance; such value must be established in the manner required by the conditions of the policy and the general rules of proof, unless there is a special valuation in the policy."

As to the last paragraph of article 2478, Dorion, C. J., says:

"The courts have generally been disposed to look upon such conditions in the spirit in which the article of the Code was enacted, and they have not always insisted that the proof should be furnished within the delay, especially when this delay, as in the present case, was a short one of fifteen days." (154)

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13 (c) Subdivisions are numbered (I), (II), (III), (IV), (V) & (VI) respectively.
(c) (IV) *insurances* reads *insurance.*
13 (d) line 2, 3, *warehouse receipts and stock lists* is omitted.
line 4, *portion* reads *portions.*
line 4, 5, *to separate as far as reasonably may be the damaged from the undamaged goods* is omitted.
13 (e) line 5, *sufferers* reads *sufferer.*

Nova Scotia, stat. cond. fourteen: the same as Ontario, except:
13 line 1, *is to* reads *shall.*
13 (a) line 2, *company* reads *insurer.*
13 (c) line 6, *through* reads *by.*
13 (e) line 3, *town clerk or city clerk* is inserted after *clerk.*
line 10, *assured* reads *insured.*

(154) Black *vs* National Ins. Co., 24 L. C. J., 65.

The Insurance Company alleged that the plaintiff should not recover because he had failed to conform to the 15th condition of the policy which gave him only fourteen days for making his proofs of loss, and that he had not obtained any extension of time until after fifteen days, and that the extension then given by the President and Secretary of the company was of no effect. The Court held:—

"Le délai porté dans les règlements d'une compagnie d'assurance, pour notifier et déclarer l'incendie et ses circonstances à la compagnie, n'est pas, dans toutes les circonstances, en terme fatal et tellement de rigueur, que, faute de remplir à la minute cette condition, l'assuré doive perdre pour toujours tout recours." (155)

RELIEF PROVISION.

R. S. O., 1897, c. 203, s. 172, provides as follows: (1) "Where by reason of necessity, accident or mistake the conditions of any contract of fire insurance on property in this Province as to the proof to be given to the insurance company after the occurrence of a fire have not been strictly complied with; or where after a statement or proof of loss has been given in good faith by or on behalf of the assured, in pursuance of any proviso or condition of such contract, the company, through its agent or otherwise, objects to the loss upon other grounds than for imperfect compliance with such conditions or does not within a reasonable time after receiving such statement or proof notify the assured in writing that such statement or proof is objected to, and what are the particulars in which the same is alleged to be defective, and so from time to time; or where, for any other reason, the Court or Judge before whom a question relating to such insurance is tried or inquired into, considers it inequitable that the insurance should be deemed void or forfeited by reason of imperfect compliance with such conditions—no objection to the

(155) Dill *vs* La Compagnie d'Assurance de Québec, 1 R. de L., 113.

sufficiency of such statement or proof or amended or supplemental statement or proof (as the case may be) shall, in any of such cases be allowed as a discharge of the liability of the company on such contract of insurance wherever entered into.

"(2) If in any action or proceeding upon a contract of fire insurance, the assured, being plaintiff in such action or proceeding, has in the opinion of the Court or Judge, wilfully neglected or unreasonably refused to furnish necessary information respecting the property for which the insurance money is claimed, and if as a consequence of such neglect or refusal, the defendant company has been at expense in obtaining information or evidence, the Court or Judge may, in disposing of costs, take into consideration the expense so incurred by the defendant company."

"173. A decision of a Court or Judge under this Act shall be subject to review or appeal to the same extent as a decision by such Court or Judge in other cases."

A provision similar to subsec. (1) of section 172, has been adopted by all the provinces which followed Ontario in legislating respecting what conditions alone should be annexed to fire insurance contracts except Quebec. (155a).

In British Columbia this provision is contained in R. S. B. C., c. 82, s. 2.

In Manitoba, R. S. Man., c. 87, s. 2.

In Alberta and Saskatchewan, North West Ordinances, c. 113, s. 2.

In Nova Scotia, R. S. N. S., c. 147, s. 7.

Proofs of Loss.

In the provinces in which there are no statutory conditions or other legislative provisions relieving the insured where there has been a failure to comply strictly with the conditions of the policy in regard to proofs of loss, the courts generally have treated provisions requiring proofs of loss to be given, as conditions precedent to the insured's right of action, and where there has not

(155a) *Vide* Cap. X infra.

been strict and literal compliance with the condition, the insured has been unable to hold the company liable. (156) It was this strict enforcement of the terms of the policy, that led at an early date in Ontario to an amendment of the Mutual Fire Insurance Companies Act by 36 V., c. 44, s. 33 which provided that "Every condition endorsed upon, or affecting any policy of insurance, which shall be held by the court or judge before whom any question relating thereto shall be tried, not to be just and reasonable, shall be absolutely null and void."

And subsequently in 1873, when the Legislature of Ontario, by 38 V., c. 65, made provision for the appointment of commissioners to prepare statutory conditions, the same Act expressly gave relief in cases of necessity, accident or mistake.

The decisions, therefore, previous to this legislation, or in provinces where legislation of this character is not to be found, will be seen to differ entirely from those which have been given under the relieving clauses of the statute.

Since the adoption of the statutory conditions in the different provinces of Canada, under the liberal provisions relating to proofs of loss and the large powers given to the court to give relief where there has been a failure to comply with the provisions respecting proofs of loss, in every case it is simply a question of whether or not the assured has afforded a reasonable excuse for non-compliance with the terms of the condition respecting proofs of loss.

It must be borne in mind that many of the cases cited under this condition were decided when there was no legislation giving relief in cases of accident, mistake, etc.

FAILURE TO MAKE PROOFS OF LOSS IN TIME LIMITED BY CONDITION.

In the following case, Cameron, J., said:

"The proofs in form and substance comply with the require-

(156) *Vide* cases collected under *waiver* and *estoppel*, *supra*, p. 199.

ments of the condition; in the matter of time they do not, and so in the language of the statute the condition has not been strictly complied with.

"If the statute does not cover this case, it is very much restricted in its remedial operation. If it does extend to this supposed case, it covers a defect in time as well as any other defect. And in my judgment it does. Full effect would not be given to the words, 'where the *conditions* as to the proof to be given are not strictly complied with' to hold otherwise. The relief is against a breach of the condition relating to the proofs. If any of the grounds of relief pointed out by the statute apply, there is no limit of time within which the error or omission with regard to the proofs must be rectified or supplied. The fact then that the proofs were not furnished for four months after the fire in the present case if the omission to supply them within thirty days was the result of a mistake, will not disentitle the plaintiff to the benefit of the statute. Once the thirty days had elapsed it was impossible to comply with the terms of the condition, and I do not see that any power exists in the Court to make any other limit.

"By another condition, that numbered 16 of the policy, the loss is not payable until thirty days after the proofs are completed. The delay in the delivery was a loss to the plaintiff and a gain to the defendants, and though such delay might in some cases furnish a reason why holding the policy forfeited would not be inequitable, under the circumstances in this case no such reason exists." (157)

Burden of proof with respect to compliance with condition as to proofs of loss.

On an action brought upon a policy of insurance the defendants pleaded the non-fulfilment of the 12th condition of the policy, which required the certificate of the nearest magistrate of the cause of the fire upon which the plaintiffs took issue.

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(157) Robins *vs* Victoria Mutual Ins. Co., 6 A. R., 427.

Held, that the proof of the plea rested upon the defendants, and the plaintiff having given *prima facie* proof of the fulfilment of the condition, was entitled to the verdict. (158)

13 (a) "NOTICE FORTHWITH AFTER LOSS."

Where the policy contained a clause providing that a written notice must immediately be given to the company, otherwise all rights under the policy should be forfeited, it was held that the giving of the notice forthwith was not thereby made a condition precedent to the right of recovery. (159)

In the case following, Cockburn, C. J., said:

"The question is substantially one of fact. It is impossible to lay down any hard and fast rule as to what is the meaning of the word 'immediately' in all cases. The words 'forthwith' and 'immediately' have the same meaning. They are stronger than the expression 'within a reasonable time', and imply prompt vigorous action, without any delay, and whether there has been such action is a question of fact, having regard to the circumstances of the particular case." (160)

A notice of loss on the twentieth day after the fire is not a compliance with the condition of a policy of insurance against fire, which requires that such notice shall be given "forthwith after loss", and compliance with such stipulation is a condition precedent to action on the policy. (161)

Dans une assurance où la police stipule que la réclamation après le sinistre sera faite sous 3 mois, une action portée après ce terme doit être déboutée. (162)

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(158) Platt *vs* Gore District Mutual Fire Ins. Co., 9 U. C. C. P., 405.

(159) Shera *vs* Ocean Accident Guarantee Co., 32 O. R., 411.

(160) The Queen *vs* Justices of Berkshire, 4 Q. B. D., 469; (approved in Accident Ins. Co. of North America *vs* Young, 20 Can. S. C. R., 280).

(161) Manchester Fire Ass. Co. *vs* Guerin, Q. R., 5 Q. B., 434; affir. 29 Can. S. C. R., 139.

(162) Armstrong *vs* Northern Ins. Co., 4 L. N., 77.

A policy of insurance covering the liability of an employer to compensate his workmen for injuries by accident in the course of their employment was made subject to a condition that the employer should give immediate notice of any accident causing injury to a workman, and to a further condition that the observance and performance by the employer of the times and terms set out in the policy, so far as they contained anything to be done by the employer, were the essence of the contract.

On December 28, 1904, the employer signed a proposal form for the insurance and received a covering note, to which no conditions were attached. On January 3, 1905, the insurers sealed, and on January 9 delivered to the employer, the policy in question, which expressed that it was to be in force from January 1, 1905 to January 1 in the following year. On January 2, 1905, a workman in the employ of the assured was injured by an accident, which was believed to be slight, and of which notice was not given at the time to the insurers. Dangerous symptoms supervened, and the injured workman died on March 15; notice of the accident was given by the employer to the insurers on March 14, the day before the workman's death. The insurers repudiated all liability under the policy, on the ground (among others) that immediate notice of the accident was not given by the employer in accordance with the condition in the policy, and that the condition was a condition precedent to the right of the employer to recover. A claim for compensation by the widow was properly settled by the employer for a reasonable sum, and the claim of the latter against the insurers was referred to an arbitrator under the arbitration clause in the policy. The arbitrator held that the condition as to giving immediate notice of injury was a condition precedent, but stated his award in the form of a special case for the opinion of the Court, which reversed the arbitrator's decision. Upon appeal by the insurers:—

Held by Vaughan Williams, L. J. and Buckley, L. J., (Fletcher Moulton, L. J., dissenting), that in the absence of evidence that the employer either knew of, or had the opportunity of knowing of, the existence of the condition at the date of the ac-

cident, the condition was one with which it was impossible to comply; that, as regards a risk which resulted in a claim before the injured had knowledge of the condition, the true inference was that the insurers never imposed the condition on the employer, and that the latter was therefore entitled to recover on the policy.

Quære whether upon the construction of the policy as a whole, apart from the particular circumstances, the condition was a condition precedent. (163)

13 (b) DELIVER AS SOON AFTERWARDS AS PRACTICABLE A PARTICULAR ACCOUNT OF THE LOSS, ETC.

A policy contained a condition requiring persons sustaining loss by fire to forthwith give notice thereof in writing and as soon after as possible deliver a particular account of the loss, stating various particulars specified.

The plaintiff, sent in his affidavit, stating in general terms the value of the different kinds of goods destroyed, but without in any way mentioning his loss on the buildings insured, the only statement as to them being that they had been totally destroyed, and without verifying his deposition by his account books or other proper vouchers. Held, clearly not sufficient. (164)

By one of the conditions indorsed on a policy of insurance, the insured was required to deliver a particular and detailed account of the loss, and, if required, to produce the books of account and other papers, vouchers, original or duplicate invoices.

Held, that a reasonable compliance with the condition was only required; that it was therefore sufficient for the insured to furnish such particulars and documents as it was reasonably

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(163) *In re* Coleman's Depositories Limited, and the Life and Health Assurance Ass., 1907, 2 K. B., 798.

(164) Carter *vs* Niagara District Mutual Ins. Co., 19 U. C. C. P., 143.

in his power to do; and that in this case, on the evidence set out below, the condition had been complied with. (165)

It was held, that the words "as soon as possible" must be construed to mean within a reasonable time under the circumstances and that it was properly left to the jury to say whether, considering all the facts, plaintiffs had complied with the condition by furnishing the second set of papers, and was not a question of law upon which the judge should have decided. (166)

The plaintiff suing upon a policy which required a particular account of the loss, as in the last case, had given only a statement that the property insured, consisting of general merchandise in his store, was totally consumed, as were also his books of account, invoices, and papers relating to the business, and that the value, as nearly as could be ascertained without such books, etc., was $3,000. His affidavit was attached verifying this statement. The evidence at the trial, however, shewed that he had the means of furnishing a more particular account through those from whom he had purchased. Held, no compliance. (167)

The account given under a similar condition, consisted of an affidavit, stating that the premises were occupied by plaintiff as general merchant's store; that the whole value of the goods and merchandise destroyed was $800 and some accounts were attached of goods sold to him, showing, however, only charges of "goods per invoice". Held, clearly insufficient. (168)

The policy required as particular and accurate an account of the loss as the case would admit, and such other evidence as the directors, etc., should reasonably require. The house insured was burned on the 21st August, 1867. On the 5th October, the plaintiff sued, and on the 9th he furnished a builder's certificate

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(165) Goldsmith *vs* Gore District Mutual Fire Ins. Co., 27 U. C. C. P., 435.

(166) Mann *vs* Western Ass. Co., 19 U. C. R., 314.

(167) Banting *vs* Niagara District Mutual Fire Ass. Co., 25 U. C. R., 431.

(168) Mulvey *vs* Gore District Mutual Fire Ass. Co., 25 U. C. R., 424.

of the value of the building which had been required by the defendants before the action. Held, that such certificate was reasonable evidence to require; that being demanded before action, the plaintiff could not sue without giving it; and that, in the absence of any special circumstances, the question whether it had been required within a reasonable time did not arise. Whether the condition authorized the demand of such certificate was a question for the court, though whether what was furnished complied with the requisition might be for the jury.

The demand was made by defendants' inspector, whose duty was to visit the agencies and adjust losses. It was objected that only the directors could make it: but, Held sufficient, they having adopted the inspector's act. (169)

A policy of insurance on several different kinds of goods for separate amounts on each is, in effect, a separate policy on each class; and where such a policy required the assured to deliver "as particular an account of the loss and damage as the nature of the case would admit": Held, he must give such account of the loss on each class of goods, and that a statement of loss upon his stock of merchandise generally was not sufficient. (170)

Where the particular account required by this condition is delivered within a *reasonable time,* this will be held to be a compliance with the term of the condition which says "as soon afterwards as practicable." (171)

A policy of insurance was made in favour of one Clarke, who assigned the same to one Davies, and on insolvency the latter assigned the policy to the plaintiff Whyte. The policy by the 9th condition provided that "all persons assured by this company and sustaining loss or damage by fire, are to give immediate notice thereof to the secretary or manager of the company, or to the agent of the company, etc., and shall within 30 days after such loss or damage deliver to the secretary, etc., a full and

(169) Fawcett *vs* Liverpool, London & Globe Ins. Co., 27 U. C. R., 225.

(170) Lindsay *vs* Lancashire Fire Ins. Co., 34 U. C. R., 440.

(171) Parsons *vs* Queen Ins. Co., 43 U. C. R., 271.

detailed account of such loss or damage, etc.", and the condition further provided that "until such proofs, declarations and certificate are produced, the loss shall not be payable", and also provided that "in case this policy shall be assigned in trust or as collateral security and loss or damage arises, it shall be the duty of the assignor to make and furnish the necessary proofs in support of the claim before the same shall be recognized and payable." Notice of loss was promptly sent in by Whyte, but no proofs were sent in until after the 30 days, but these were not made out by the assignor Clarke.

The Privy Council held in the first place that the proofs of loss under the policy were required to be made by Clarke the assignor. Secondly, that the 30 days formed a material part of the condition, and that the assured could not recover unless he sent the proper proofs within the 30 days, unless this condition had been waived, stating in answer to the contention that the period of 30 days was not material that "if that were so, then there would be no time appointed at all within which the proofs were to be sent in, and the assured might wait one, two, or three or four years before he sent in his proof, and still be entitled to recover, which would appear to be entirely contrary to the true meaning of the condition." (172)

In a case in which the facts were somewhat similar to those in Whyte *vs* Western Ass. Co., supra, p. 188, there was a provision in the policy that notice of loss should be given forthwith and proofs of loss within 14 days, and that until the proofs had been given no money should be payable by the company under the policy; but contained also the additional provision that "if the claim shall not, for the space of three months after the occurrence of the fire, be in all respects verified in manner aforesaid, the assured shall forfeit every right to restitution or payment by virtue of this policy."

The court held, following Whyte *vs* Western, that the delivery

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(172) Whyte *vs* Western Ass. Co., 20 R. J. R. Q., 249.

of the proofs of loss within the 14 days was a condition precedent to the plaintiff's right of recovery. (173)

And where the evidence conclusively showed that the insured with the assistance of his clerk, could have made a tolerably correct list of the goods lost, and he had failed to do so within the 14 days provided by the policy, but in lieu thereof had delivered an affidavit stating only the general character of the property insured and that his invoice book had been burned, it was held that the condition of the policy was not complied with and the plaintiff could not recover. (174)

13 (c) FURNISH A STATUTORY DECLARATION.

The words "as soon afterwards as practicable" in 13 (b) do not apply to this subsection. (175)

The lack of a jurat to the affidavit of loss was held to preclude the plaintiff from recovering. (176)

One of the conditions of a policy of insurance required that all persons sustaining loss should give notice to the agent through whom insured, and, within one month after the loss, deliver in as particular an account thereof as the nature of the case would admit, and, if required, make proof of the same by their oath or affirmation, and by the production of their books of account, etc., and should, if required, procure a certificate under the hands of three of the nearest householders, etc. The plaintiff having sustained a loss, furnished an affidavit and certificate in the terms of the condition, without being required to do so. In an action on the policy, one of the notices of defence was that the proof and certificate required by the condition were not given by the plaintiff after the alleged loss; but the defence on the trial was, concealment at the time of effecting the policy.

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(173) Morrison *vs* City of London Ins. Co., 6 Man. R., 225.
Vide also Baker *vs* Royal Ins. Co., 1 O. W. R., 294.

(174) Nixon *vs* Queen Ins. Co., 23 Can. S. C. R., 26.

(175) *Vide* Cammell *vs* Beaver & Toronto Mutual Ins. Co., infra, p. 454.

(176) Shaw *vs* St. Lawrence Mutual Ins. Co., 11 U. C. R., 73.

One of the grounds set up upon the application for a new trial was that the proofs of loss had been admitted as evidence, but the Court held, 1. That the affidavit and certificate were admissible as part of the preliminary proof. 2. But if not strictly admissible, it was immaterial evidence, and therefore no ground for a new trial. (177)

It was a condition of the policy that persons sustaining loss should declare on oath whether any and what other insurance or incumbrance had been made on the insured property. The notice given said nothing about incumbrance, and a mortgage was proved, made by the plaintiff about a month before the policy. Held, that though this mortgage was not within the condition, yet the plaintiff could not recover, or he had not complied with the condition, which required him to declare whether there was or was not any incumbrance, and he had not declared that there was not. (178)

13 (d) VOUCHERS.

The words "as soon afterwards as practicable" in 13 (b) do not apply to this subsection. (179)

Persons insured were bound, within thirty days after a loss "to deliver in a particular account of such loss or damage, signed by their own hand, and verified by their oath or affirmation, and by their books of account and other proper vouchers". The plaintiff sent in his affidavit, stating generally the value of the reeve, as the nearest magistrate, as to his inquiry into and belief with regard to the fire being accidental, and of two merchants: and a book containing a statement of the goods lost, made up partly from invoices and partly from recollection, but not verified by his account books or other vouchers, which he had, but did

(177) Perkins *vs* Equitable Ins. Co., 4 All., 562.

(178) Markle *vs* Niagara District Mutual Fire Ins. Co., 28 U. C. R., 525.

(179) *Vide* Cammell *vs* Beaver & Toronto Mutual Ins. Co., infra, p. 454.

not produce, nor by his affidavit. Held, clearly, no compliance with the condition. (180)

INVOICE.

The non-production of certain invoices demanded by the company, which it was within the power of the insured to furnish, was held to be a ground for setting aside a judgment in favour of the plaintiff and ordering a new trial; and a verdict on the new trial in favour of the defendants on a plea setting up that vouchers and explanations which the plaintiffs could have given had not been furnished as required, was well founded. (181)

SORTING OUT DAMAGED GOODS.

One of the conditions of the policy required, among other things, that where property was partially damaged by fire, the insured should forthwith cause it to be put in as good condition as the case would allow, assorting the various articles, and separating the damaged from the undamaged goods, so that the damage could easily be ascertained; and should cause a list of the whole to be made, after which the amount of the damage should be ascertained, etc. The declaration on this policy alleged a total loss of the property insured. The defendants pleaded, after setting out this condition, that portions of the property were partially damaged, but the plaintiff did not, with regard to it, comply with requirements of the conditions. The plaintiff replied that the property wholly destroyed far exceeded in value the amount insured, and that he sued only for the loss thereon, and not on the property partially destroyed. Held, replication good, for that the condition was not applicable where the claim was only for goods wholly destroyed. Held, also, that the replication was not a departure, for the plaintiff under the declaration for a total loss might recover for a partial one. (182)

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(180) Greaves *vs* Niagara District Mutual Fire Ins. Co., 25 U. C. R., 127.

(181) Cinq-Mars *vs* Equitable Ins. Co., 15 U. C. R., 143, 246.

(182) Williamson *vs* Hand-in-Hand Mutual Fire Ins. Co., 26 U. C. C. P., 266.

13 (e) CERTIFICATE OF MAGISTRATE, ETC.

The words "as soon afterwards as practicable" in 13 (b) do not apply to this subsection.

The policy contained a condition requiring persons sustaining loss by fire to forthwith give notice thereof in writing, and as soon after as possible to deliver a particular account of the loss, stating various particulars specified; and in case of buildings or other fixed property, to accompany said statement by the certificate of a builder, etc. "They shall also produce a certificate under the hand and seal of a magistrate", etc., "and until such proofs, declarations and certificates are produced, the loss shall not be payable."

Held, 1. That the condition requiring a seal was not unjust nor unreasonable. 2. That the words "as soon after as possible" did not apply to the magistrate's certificate, which was required to be produced only within a reasonable time. 3. Semble, that the question of reasonable time here, there being no facts in dispute, was for the court; and, under 37 V., c. 7, s. 33, the jury having found for the plaintiff on all the other issues, and the motion being to enter a verdict for the plaintiff on the evidence, the court held that the second certificate was produced within a reasonable time, and entered the verdict for the plaintiff on this issue. (183)

Where there is no statutory provision relieving the insured a literal compliance with this condition in the policy is required.

The assured obtained a certificate from a magistrate, but not the one most contiguous to the place of fire as required by the policy, and a plea to this effect having been set up by the company to the declaration, in delivering the judgment of the court, the Chief Justice held that the plaintiff inevitably failed upon this plea as he did not prove that the magistrate he went to was the nearest magistrate. (184)

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(183) Cammell *vs* Beaver & Toronto Mutual Fire Ins. Co., 39 U. C. R., 1.

(184) Lampkin *vs* Western Ass. Co., 13 U. C. R., 237.

Where the assured became insolvent after the loss, and the action on the policy was brought by his assignee, a certificate from the magistrate that the assignee, without fraud or evil practice sustained the loss sued for, was held insufficient, as it was consistent with such certificate that in the magistrate's belief the fire had occurred through the fraud of the assured. (185)

A certificate from the magistrate to the effect that he believed the insured had suffered loss without fraud or culpable carelessness is insufficient to comply with the condition which requires that the certificate should state that the magistrate had made diligent inquiry into the facts set forth in his statement. (186)

In an action on a policy of insurance, by one condition of which the plaintiff was bound to produce as part of his proofs of loss, a certificate of a magistrate or notary public most contiguous to the place of fire, not concerned in the loss, etc., that he was acquainted with the character and circumstances of the assured, and had made diligent inquiry into the facts set forth in his statement, and that he knew, or verily believed that the insured really and by misfortune, and without fraudulent practice, had sustained by such fire loss and damage to the amount therein mentioned, it was Held, that a certificate which did not state the amount of the loss, but only that the insured had sustained by the fire the "total loss of his two storey framed building therein mentioned", was not a sufficient compliance with the condition, and that the setting forth of the amount of the loss in the certificate was a condition precedent to the right to recover. (187)

One of the conditions of a fire policy required that persons sustaining loss should procure a certificate of a magistrate or notary most contiguous to the place of the fire, and not concerned in the loss as a creditor or otherwise, or related to the insured or sufferers, "that he was acquainted with the insured, and verily believed that he had sustained the loss without fraud, etc." Held,

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(185) Kerr *vs* British America Ins. Co., 32 U. C. R., 569.

(186) Mason *vs* Andes Ins. Co., 23 U. C. C. P., 37.

(187) Borden *vs* Provincial Ins. Co., 2 P. & B., 381.

that where the nearest magistrate was also a sufferer by the same fire which destroyed the plaintiff's property, he was disqualified from certifying under the words of the condition "concerned in the loss as a creditor or otherwise."

Quære. Whether the fact of the nearest magistrate being a creditor of the insured disqualified him from certifying.

Semble. No. (188)

When one of the conditions of a policy requires a certificate from the magistrate most contiguous to the place where the fire occurred, stating such fire to have been accidental, etc., the furnishing such a certificate is a condition precedent to his right to claim for any loss. A certificate signed by a magistrate ten miles distant, where there are others within a mile of the fire, will not be sufficient. (189)

The policy of insurance issued by defendants to plaintiff required among other things, as a condition precedent to recovery under the policy, a certificate under the hand of a magistrate or notary public most contiguous to the place of fire. The fire took place at Sable River, a country district several miles in length and breadth, and the evidence for plaintiff was merely to the effect that the certifying Justice resided at Sable River.

It was held, that even in the absence of countervailing testimony, as the plaintiff had notice by the pleadings and the motion for non-suit that proof of compliance with this condition would be required, the evidence was not sufficient to sustain the finding of the jury for plaintiff. (190)

The furnishing of a certificate, as required by the condition of a policy of insurance, of three respectable persons that they believe that the loss has not occurred by fraud, is a condition precedent, without compliance with which the assured cannot recover. (191)

In a judgment of the Judicial Committee on appeal from the

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(188) Ganong *vs* Ætna Ins. Co., 6 All., 75.
(189) Moody *vs* Ætna Ins. Co., 2 Thom., 173.
(190) Herkins *vs* Provincial Ins. Co., 3 R. & C., 176.
(191) Racine *vs* Equitable Ins. Co. of London, 6 L. C. J., 89.

Court of King's Bench for the Province of Lower Canada, in which a policy of insurance required that the insured should produce a certificate from certain parties certifying their knowledge or belief that a loss had been sustained to the amount therein mentioned, the certificate produced did not so state. It was held that this was a complete bar to the action. (192)

Where the condition required a certificate to be obtained from two magistrates most contiguous to the place of fire, and these magistrates refused to give the certificate and the insured obtained certificates from two other magistrates residing at a distance, it was held that the non-production of the certificate prevented the assured from recovering on the policy. (193)

VARIATION AS TO MAGISTRATE'S CERTIFICATE.

Vide Shannon *vs* Hastings Mutual Ins. Co., infra, p. 496.

Condition 14. (Ontario).

"The above proofs of loss may be made by the agent of the assured, in case of the absence or inability of the assured himself to make the same, such absence or inability being satisfactorily accounted for." (194)

Condition 15. (Ontario).

"Any fraud or false statement in a statutory declaration, in relation to any of the above particulars, shall vitiate the claim." (195)

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(192) Scott *vs* Phœnix Ass. Co., Stuart's Repts., (Lower Canada), 354.

(193) Logan *vs* Commercial Union Ins. Co., 13 Can. S. C. R., 270.

(194) Condition 14. — Corresponding section in the Fire Insurance Policy Acts of the other provinces of Canada:

British Columbia, Alberta & Saskatchewan, and Manitoba, stat. cond. fourteen, and Nova Scotia, stat. cond. fifteen: the same as Ontario.

(195) Condition 15. — Corresponding section in the Fire Insurance Policy Acts of the other provinces of Canada:

British Columbia, Alberta & Saskatchewan and Manitoba, stat. cond. fifteen, and Nova Scotia, stat. cond. sixteen: the same as Ontario.

It is not essential that fraud should be directly proved. It is sufficient if a clear case is established by presumption or inference or by circumstantial evidence. (196)

In the provision making the policy void for false swearing in connection with the proofs of loss, the word "false" means "fraudulently false."

Defendants pleaded, that after the fire the plaintiff, in making his claim, had misrepresented and over-stated the amount of his loss, contrary to the condition in the policy. Held, that to sustain this plea it was necessary to prove that the over-estimate did not arise from mistake or inadvertence, but was made designedly, for the purpose of obtaining a larger sum than the loss really sustained, or to prevent close inquiry. (197)

The question of fraud is one for the jury, and although the court may be dissatisfied with the value set upon his property by the assured, still unless he appears to have valued it too high *mala fide,* and not by error of judgment, they will not disturb the verdict. (198)

A condition of the policy was that any fraud or attempt at fraud, or false swearing, on the part of the assured, should cause a forfeiture of all claims under the policy. After the loss by fire plaintiff made a statement under oath, that he was absolute owner of the property at the time of the fire, whereas, under the conveyance to him and his wife, he was only jointly interested with her therein.

Held, reversing the judgment below, that he was not guilty of false swearing within the meaning of the condition; for that the word "false", as used there, meant wilfully and fraudulently false (of which defendants had themselves at the trial acquitted plaintiff), whereas it was merely an incorrect description of his title with which he could be charged. (199)

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(196) North British & Mercantile Ins. Co. *vs* Tourville, 25 Can. S. C. R., 177.

(197) Park *vs* Phœnix Ins. Co., 19 U. C. R., 110.

(198) Rice *vs* Provincial Ins. Co., 7 U. C. C. P., 548.

(199) Mason *vs* Agricultural Mutual Assurance Ass., 18 U. C. C. P., 19.

The plaintiff did not in his declaration of loss disclose an incumbrance in favour of his father. The jury did not find, nor were they asked to find, that there was any fraud or false statement in the plaintiff's statutory declaration. Held, that fraud or a wilful false statement should have been proved, and that it was not the place of the court to infer it. Mason *vs* Agricultural Ins. Co., 18 U. C. C. P., 19, followed. (200)

The plaintiff having represented his loss at a much larger sum than the jury found he had sustained, the court nevertheless refused to interfere on this ground, as the jury at the same time found that he had acted honestly in making the representation, and the evidence in the opinion of the court sustained that finding. (201)

Under a clause in a policy of insurance, that if there appear fraud in the claim made to the loss, or false swearing or affirmation in support thereof, the claimant shall forfeit all benefit under such policy; the Court will reject the claim of the policyholder, if the Company establish that the claim is unjust and fraudulent, and far in excess of the actual loss, to the knowledge of the policy holder. (202)

It was held in Quebec that no bad faith being proved, the over-valuation did not vitiate the policy and judgment was rendered for such sum as appeared to be supported by the evidence. (203)

ONUS PROBANDI.

Where a party insured, claims to have lost by fire more than double the amount subsequently ascertained by his and the company's valuators to be the true amount of the loss, the claim will be held to be fraudulent in the absence of clear evidence to the

(200) Reddick *vs* Saugeen Mutual Fire Ins. Co., 14 O. R., 506; 15 A. R., 363.

(201) Parsons *vs* Citizens Ins. Co., 43 U. C. R., 261.

(202) Grenier *vs* Monarch Fire & Life Ins. Co., 3 L. C. J., 100.

(203) Pacaud *vs* Queen Ins. Co., 21 L. C. J., 111.

contrary, and the reference to valuators, (without waiver of the conditions of the policy), will not deprive the company of the benefit of the condition that all claim under the policy shall be forfeited in the case of fraud in the claim or of false swearing by the assured. (204)

The plaintiffs in their statement of loss by fire claimed that a building constituting part of the property destroyed was worth $2,000. The evidence as to the real value of the building was such as to convince the Court that it was not worth when new more than $800 to $1,000, and that at the time of the fire it was not worth more than $500.

Held, that the verdict, which was the second verdict for the plaintiffs, must be set aside on the ground of fraudulent overcharge in the claim of loss, the policy providing that the insured should forfeit all remedies if guilty of "any wilful misstatement with intent to deceive the company as to the amount of loss." (205)

A condition provided for the proofs to be furnished in case of loss, and declared, "if there appear any fraud or false swearing in the proofs, declarations or certificates", the insured shall forfeit all claim under the policy.

Held, that this meant wilful false swearing; also, that a false statement, to avoid the policy, must be material.

A further condition required that the insured should within thirty days after loss deliver a full and detailed account in writing, etc., and stating (inter alia) what was the whole actual cash value of the subject insured.

Held, that a plea, alleging that in an affidavit made by plaintiff in relation to the alleged loss "he falsely swore that the actual cash value of the property insured was $500", was bad, because it did not state that knowingly and wilfully he swore falsely. (206)

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(204) Larocque *vs* Royal Ins. Co., 23 L. C. J., 217.

(205) McLeod et al. *vs* Citizens Ins. Co., 1 R. & G., 21.

(206) Steeves *vs* Sovereign Fire Ins. Co., 20 N. B. Rep., 394.

The plaintiff insured in defendants' office $300 on a building and $100 on merchandise, ships, stores, etc., representing the value of the property insured to be $1,860. The property being totally destroyed by fire during the absence of plaintiff, he notified defendants' agents of the fact, when they said, "obtain the information (required) after you get home, as soon as possible, and that will do", which plaintiff did.

It was held, that on the question of waiver of strict compliance with terms of policy as to notice, the jury were justified in finding for plaintiff. The jury having in answer to a written question from the judge, "whether plaintiff made any false representations to the company or to its agents respecting the value of the property insured, or any part thereof, respecting his claim for the loss, or in any other respect", replied "incorrect and unguarded representations through ignorance respecting the value of the building, ships' materials, puncheons, etc."

It was held, that this answer negatived fraud on the part of the plaintiff in the over-valuation of his property, and that the verdict which was for a less amount than the claim must stand. (207)

Under conditions in a policy of fire insurance for $400 requiring that in claiming for a loss the whole actual cash value of the property insured should be declared, and providing that any fraud or false swearing should vitiate the claim, defendants pleaded that plaintiffs delivered a false and fraudulent account of the alleged loss, and that plaintiffs had declared the building destroyed to be worth $600 to induce the defendants to pay him $400, whereas the building was not of that value and plaintiff had not suffered damages to that extent, as the insured well knew.

It was held, that the defence was sufficiently pleaded. (208)

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(207) Cann *vs* Imperial Fire Ins. Co., 1 R. & C., 240.

(208) Gastonguay et al. *vs* Sovereign Fire Ins. Co., 3 R. & G., 334.

IF THE AFFIDAVIT IS FALSE AS TO SOMETHING NOT REQUIRED TO BE VERIFIED UPON OATH, THIS WILL NOT VOID THE POLICY IN ONTARIO.

One of the conditions of a fire policy required that persons insured should within fourteen days give in writing an account of their loss or damage, such account of loss to have reference to the value of the property destroyed or damaged immediately before the fire, and should verify the same by their accounts, and by affidavit, and such vouchers as in the judgment of the company might tend to prove such account and value, and should produce such further evidence and give such explanations as might be reasonably required; and if there should appear any fraud or false statement in such account of loss or damage, or in any of such accounts, evidence, or explanations, or if such affidavit should contain any untrue statement, the policy should be void. Held, that as an affidavit could be required only to verify the account of loss or damage, the "untrue statement" must refer also to such account, and that an untrue statement in the affidavit as to the plaintiff's title, would not avoid the policy.

In this case the statement complained of was, that the plaintiff was absolute owner of the building insured, which was unincumbered, whereas he had not yet paid for the land. He had, however, put up the building himself, so that if it had not become part of the realty his statement would have been literally true. (209)

BUT THE CONTRARY HAS BEEN HELD TO BE THE LAW IN NEW BRUNSWICK.

A condition of a policy of insurance on clothing, provisions, etc., in St. John, required that persons sustaining loss should forthwith give notice thereof to the company, and within fourteen days thereafter deliver in as particular an account of the

(209) Ross *vs* Commercial Union Ass. Co. of London, 26 U. C. R., 552.

loss as the nature and circumstances of the case would admit of, and make proof of the same, etc.; and if there appeared any fraud or false statement, or that the fire happened by the wilful means or connivance of the insured, he should be excluded from all benefit under the policy. The plaintiff's affidavit furnished to the company under this condition, claiming a loss of furs, clothing and bedding by fire, stated that he was in the county of Sunbury at the time of the fire and was unable to ascertain in what manner it originated. In his evidence on the trial, the plaintiff swore that he left St. John about 7 o'clock p. m. on his way to the county of Sunbury, where he arrived the following morning; the fire broke out at 9 o'clock, at which time the plaintiff would have been in the county of Kings, on his way to Sunbury, and only a few miles from St. John. The house was locked when the fire was discovered, and on being broken open it was found to be in a room in which there was neither fireplace nor stove, and no appearance of any clothing or bedding; a candlestick was found in a barrel in this room containing straw partly consumed. Held, that it was the duty of the plaintiff to state in his affidavit that the house was locked at the time of the fire, the circumstances connected with his leaving, and where he was at the time, and that his statement that he was in the county of Sunbury was a false statement and avoided the policy. Held also, that an account of the loss delivered within fourteen days after knowledge thereof by the assured was in time, though more than fourteen days had elapsed since the fire. (210)

FALSE SWEARING AS TO PART WILL VOID ALL.

Plaintiff insured two buildings, and the merchandise in one of them, against loss by fire. One of the conditions of the policy declared that if there should be any fraud, overcharge or false swearing, the claimant should forfeit all claim under the policy. One ground of defence to an action brought on the policy was,

(210) Smith *vs* Queen Ins. Co., 1 Han., 311.

that the plaintiff made a false declaration as to the value of the goods lost by the fire. Held, that the contract was entire; and it the plaintiff was guilty of fraud or false statement in reference to the goods he could not recover any part of the insurance. (211)

The plaintiff by a policy of insurance against fire effected an insurance on buildings and contents, by separate amounts being placed on each, the amount on contents being $200. In the proofs of loss, to induce the defendants to pay the loss, the plaintiff falsely and fraudulently stated in the statutory declaration furnished by her, that she had suffered loss on the contents to the amount of $1,665.50; whereas the contents were proved to be worth only $150. Held, that the misstatement vitiated the whole claim, and not merely the claim in respect to the particular property as to which it was made. (212)

A CONDITION NOT COMMINATORY.

The condition of a policy imposing the penalty of a forfeiture of all remedy upon it, in the event of any fraudulent overcharge in the statement of loss, is not comminatory, but will be carried out if such overcharge be proved. (213)

Condition 16. (Ontario).

"If any difference arises as to the value of the property insured, of the property saved, or of amount of the loss, such value and amount and the proportion thereof (if any) to be paid by the company shall, whether the right to recover on the policy is disputed or not, and independently of all other questions be submitted to the arbitration of some person to be chosen by both parties, or if they cannot agree on one person, then to two persons, one to be chosen by the party assured and the other by the company, and a third to be appointed by the persons so chosen,

(211) Cashman *vs* London & Liverpool Ins. Co., 5 All., 246.
(212) Harris *vs* Waterloo Mutual Fire Ins. Co., 10 O. R., 718.
(213) Thomas *vs* Times & Beacon Fire Ins. Co., 3 L. C. J., 162.

or on their failing to agree, then by the County Judge of the county wherein the loss has happened; and such reference shall be subject to the provisions of *The Arbitration Act;* and the award shall, if the company is in other respects liable, be conclusive as to the amount of the loss and proportion to be paid by the company; where the full amount of the claim is awarded the costs shall follow the event; and in other cases all questions of costs shall be in the discretion of the arbitrators." (214)

Where after action brought the insurers take proceedings under the arbitration clause of the statutory conditions, and the arbitrators make an award, if the action goes on to trial, the plaintiff is limited in his recovery to the amount so awarded,

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(214) Condition 16. — Corresponding section in the Fire Insurance Policy Acts of the other provinces of Canada:

British Columbia, stat. cond. sixteen: the same as Ontario, except:
line 2, *of* is omitted before *amount.*
line 10, *a Judge of the Supreme Court of British Columbia or,* is inserted after *by.*
line 12, *The Arbitration Act* reads *the laws applicable to references in actions.*

Alberta & Saskatchewan, stat. cond. sixteen: the same as Ontario, except:
line 2, *of* is omitted before *amount.*
line 3, (*if any*) reads *if any.*
line 10, *on* reads *in the event of.*
line 10, 11, *the County Judge of the county wherein the loss has happened* reads *a judge of the Supreme Court of the North-West Territories.*
line 12, *Act* reads *Ordinance.*

Manitoba, stat. cond. sixteen, the same as Ontario, except:
line 2, *the* is inserted before *amount.*
line 10, 11, *County Judge of the County* reads *Judge of the County Court of the judicial division.*
line 12, *The Arbitration Act* reads *the laws applicable to references in actions.*

Nova Scotia, stat. cond. seventeen: the same as Ontario, except:
line 4, 9, 15, *company* reads *insurer.*
line 10, *Court* is inserted after *County.*
line 11, *reference* reads *references.*
line 14, *the* is inserted before *proportion.*

although the jury may have found in his favour for a larger amount. (215)

Proceedings under R. S. O., 1887, c. 167, s. 114 (16), for the ascertainment of the amount of a loss under a fire policy, are proceedings in the nature of an arbitration and not of a valuation merely. Arbitrators must be indifferent, and an award made by arbitrators, one of whom was at the time of arbitration sub-agent for an agent of the defendants in obtaining insurance risks, though he had acted as such to only a very small extent, was held void. (216)

In an action on a policy, on which was endorsed a condition that in case any question should arise "it is a condition of this policy, which the assured by the acceptance thereof agrees to abide by... every such difference shall be referred to the arbitration and decision of a mutual person... and the decision of the arbitrator shall be final and binding on all parties, and shall be conclusive evidence of the amount payable... and it is hereby expressly stipulated and declared that the obtaining of an award by such arbitrator shall be a condition precedent to the liability or obligation of the corporation to pay or satisfy any claim under this policy", etc. "Provided also, that compliance with the stipulations endorsed hereon is a condition precedent to the right to recover on this policy."

It was held, that an action did not lie on the policy, nor did the mount payable under it become due, until the determination of the arbitrator to be appointed under the agreement to refer contained in the condition. It was also held, that the condition was not in contravention of section 80 of The Ontario Insurance Act, R. S. O., 1897, c. 203. (217)

Arbitration where the loss is total.

The plaintiffs effected with the defendants an insurance

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(215) Smith *vs* City of London Ins. Co., 14 A. R., 328.

(216) Vineberg *vs* Guardian Fire & Life Ass. Co., 19 A. R., 293.

(217) Nolan *vs* Ocean Accident & Guarantee Corporation, Ltd., 5 O. L. R., 544.

against loss by fire on their stock of dry goods. The stock was totally destroyed by the fire of June, 1877. The policy contained among others, the following provisos: 1st. That in case of damage to personal property, the amount of damages should be determined by appraisal by competent parties, to be mutually appointed by the assured and the company. 2nd. That in case of any difference arising touching any loss or damage, the same should, at the written request of either party, be submitted to impartial arbitrators. 3rd. That the defendants should not be sued for any claim until after an award fixing the amount of the claim in the manner above prescribed. In an action on the policy for a total loss, the defendants pleaded that the action was commenced before any award had been obtained fixing the amount of the claim.

The plaintiffs replied: 1st. That the defendants did not make any written request to submit any difference between them to arbitration. 2nd. That the plaintiffs, before the commencement of the suit, requested the defendants to submit the differences between them to arbitration, and they neglected and refused to do so.

Held, on demurrer to the replications, per Weldon, J., 1st. That the covenant that the amount of the claim should be fixed by arbitration did not apply when the claim was for a total loss. 2nd. That the covenant was collateral, and was not a condition precedent to plaintiffs' right of action.

Per Wetmore, J., that the covenant was a condition precedent, and would have to be performed before plaintiffs would have any right of action, and the fact that defendants refused to appoint an arbitrator would not relieve them from performance. (218)

It has been held in the Province of Ontario, that where an action is brought upon a policy of insurance containing an arbitration clause, it will be stayed at the instance of the company until the arbitration has taken place. (219)

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(218) Adams et al. *vs* National Ins. Co., 20 N. B. Rep., 569.
(219) McInnes *vs* Western Ass. Co., 30 U. C. R., 580.

But the insurers are not entitled to a stay of proceedings pending an arbitration under Condition 16, in an action for a loss under a policy of fire insurance, where they refuse to agree to pay the amount which may be awarded by the arbitrators. (220)

Where a provision for arbitration similar to Condition 16 of the statutory conditions of Ontario was annexed to a policy of insurance in the Province of Quebec, the Supreme Court of Canada, reversed the Court of Review which had held this provision void as tending to oust the jurisdiction of the courts of law and so contrary to public policy. (221)

A policy of fire insurance provided, inter alia, that "where the company did not claim to avoid its liability under the policy on the ground of fraud, or non-fulfilment of any of the conditions therein set forth, but a difference at any time arose between the company and the insured as to the amount payable in respect of any alleged loss or damage by fire, every such difference when and as the same arose should be referred to the arbitration of persons chosen by the parties"; and it was expressly "declared to be a condition of the making of the policy", where the company did not deny liability on the ground of fraud or non-fulfilment, "that the insured should not be entitled to commence any action at law" "till the amount should have been awarded as thereinbefore provided", and that the "obtaining such an award should be a condition precedent to the commencement of any action upon the policy." The arbiters were not named in the policy:—

Held, reversing the decision of the Court of Session (18 Court Sess. Cas., 4th Series, (Rettie), 1219), first, that the condition to ascertain the damage by arbitration was incorporated with and formed an integral part of the contract of indemnity, and was a condition precedent to the bringing of any action upon the policy. Secondly, that the contract, being one upon which no cause of action accrued until the amount of damage had been

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(220) Hughes *vs* London Ass. Co., 4 O. R., 293.

(221) Guerin *vs* Manchester Fire Ins. Co., 29 Can. S. C. R., 139.

determined by arbitration, was excepted from the rule of Scotch law that a reference to arbiters not named cannot be enforced. (222)

CONDITION AS TO ARBITRATION MAY BE WAIVED.

Vide Anchor Marine Ins. Co. *vs* Corbett, supra, p. 186.

RIGHT OF ENTRY AND DUTY OF ASSURED AFTER LOSS.

Vide addenda et corrigenda supra.

Condition 17. (Ontario).

"The loss shall not be payable until sixty days after the completion of the proofs of loss, unless otherwise provided for by the contract of insurance." (223)

In the original Fire Insurance Policy Act, 39 V., c. 24, this section read 30 days instead of 60 days, the time limit being altered by 60 V., c. 36.

In an action of covenant on a policy which provided that losses should be paid within sixty days after the proof of them,

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(222) Caledonian Ins. Co. *vs* Gilmour, (1893), A. C., 85.

(223) Condition 17. — Corresponding section in the Fire Insurance Policy Acts of the other provinces of Canada:

British Columbia, stat. cond. seventeen: the same as Ontario, except:

line 1, *sixty* reads *thirty*.

line 1, *the* is omitted before *completion*.

line 3, (1895), *c.* 22, *s.* 3) is inserted at end.

Alberta & Saskatchewan, stat. cond. seventeen: same as Ontario, except:

line 1, *sixty* reads (*sixty*).

line 1, *the* is omitted before *completion*.

line 3, 1903, *2nd session*, *c.* 20, *s.* 4, is inserted at the end.

Manitoba, stat. cond. seventeen: the same as Ontario, except:

line 1, *sixty* is omitted, & number of days is left blank.

line 1, *the* is omitted before *completion*.

line 3, (*The blank shall be filled in the case of mutual and cash mutual companies with the word "sixty" and in the case of other companies with the word "thirty"*), is inserted at the end.

Nova Scotia, stat. cond. eighteen: the same as Ontario.

and that no suit should be maintained unless commenced within twelve months after the cause of action should accrue, it was pleaded that the fire took place more than twelve months before the suit commenced. Held, no defence. (224)

Where it was a condition that "payment of losses should be made in sixty days after the loss shall have been ascertained and proved"; it was held, that the time was to be counted from the time when the assured had put in all the proof on which he relied; and that any objection to the sufficiency of such proof must be raised by a special plea, not under that condition. (225)

Place of payment.

Where no place of payment of a policy of insurance is mentioned in the policy it must be assumed that the place of payment is where the head office of the insurance company is situated, and this fact may determine the question of the *lex loci contractus*. (226)

To an action by the administrator in Ontario of W. M., deceased, on a policy on the life of W. M., which, by the terms thereof, was payable in Montreal, in the Province of Quebec, the defendants pleaded that the policy was issued from their office in Montreal; that by its terms the moneys were payable there; that the defendants had no office in Ontario for the payment of moneys by them, and that the plaintiff had not obtained letters of administration in Quebec, and had no right or title to sue for the moneys.

Held, on demurrer, a good defence. (227)

The declaration alleged that the policy sued on was subject

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(224) Lampkin *vs* Western Ass. Co., 13 U. C. R., 361.

(225) Rice *vs* Provincial Ins. Co., 7 U. C. C. P., 548. Hatton *vs* Provincial Ins. Co., 7 U. C. C. P., 555.

(226) Clarke *vs* Union Fire Ins. Co., 10 P. R., 313. *Vide* 6 O. R., 223. *Vide* also R. S. O., cap. 203, s. 143, and Burson *vs* German Ins. Co., supra, p. 27.

(227) Pritchard *vs* Standard Life Ass. Co., 7 O. R., 188.

to the conditions indorsed thereon, and averred a fulfilment of all the conditions necessary to entitle the plaintiff to maintain the action. Defendants pleaded that one of these conditions was that payment of the loss need not be made until sixty days after the same should have been ascertained and proved, and that at the commencement of the action the alleged loss had not been ascertained and proved. Held, that the plea was good, inasmuch as it clearly appeared from the declaration and plea coupled together, that the condition was precedent; and that it was not necessary in the plea to point out how the loss was to be ascertained and proved, that being a matter of evidence. (228)

The pretension that the insured and his representatives were unable to furnish such proofs in consequence of the loss of the policies, cannot avail where it is neither alleged nor proved that the policies were lost prior to the fire or within sixty days thereafter — the time within which proofs of loss had to be made. (229)

By one of the conditions of a policy of fire insurance, payment of claims for loss thereunder was to be made within sixty days after production of the oath or affirmation, in respect of his alleged loss. The only waiver by the company was of the right to exact production of a statement within the fixed delay of fifteen days from the date of the fire.

Held:—That the action for the above reasons, and also because it was instituted before the expiration of sixty days after the loss, was premature. (230)

REFUSAL TO PAY A WAIVER OF PROOFS OF LOSS.

Vide Morrow *vs* Lancashire Ins. Co., supra, p. 197.
Hatton *vs* Provincial Ins. Co., supra, p. 197.

(228) Johnston *vs* Western Ass. Co., 4 A. R., 281.

(229) Prévost *vs* Scottish Union & National Ins. Co., Q. R., 14, S. C., 203.

(230) Dupuis *vs* North British Mercantile Ins. Co., Q. R., 13 S. C., 443.

VARIATIONS TO THE SEVENTEENTH STATUTORY CONDITION.

Smith *vs* City of London Ins. Co., infra, p. 496.
Hartney *vs* North British Ins. Co., infra, p. 496.
Sauvey *vs* Isolated Risk, infra, p. 497.

Condition 18. (Ontario).

"The company, instead of making payment, may repair, rebuild, or replace, within a reasonable time, the property damaged or lost, giving notice of their intention within fifteen days after receipt of the proofs herein required." (231)

By a policy upon a dwelling-house, the company were to have the option of making good the loss or damage either in money, according to the sum insured, or by re-building, or by repairing the same, according to circumstances. The house having been destroyed by fire, the company, instead of paying, elected to rebuild, which they commenced doing without having obtained from the insured any plan of the house destroyed, and against his express objection to their proceeding; they also intentionally departed from what was known to be a feature of the old building. Thereupon the insured filed a bill to restrain the company from proceeding to erect the building in the defective manner pointed out, and praying that they might be decreed specifically to perform the condition by erecting a house exactly, or at least

(231) Condition 18. — Corresponding section in the Fire Insurance Policy Acts of the other provinces of Canada:

British Columbia and Alberta & Saskatchewan, stat. cond. eighteen, the same as Ontario, except:

line 4, *the* is inserted before *receipt.*

Manitoba, stat. cond. eighteen, the same as Ontario, except:

line 4, *the* is inserted before *receipt.*

line 4, *proofs* reads *proof.*

Nova Scotia, stat. cond. nineteen, the same as Ontario, except:

line 1, *company* reads *insurer.*

line 3, *their* reads *his.*

line 4, *herein* reads *by the policy.*

substantially, corresponding with that destroyed. The court dismissed the bill; but, under the circumstances, without costs. (232)

Condition 19. (Ontario).

"The insurance may be terminated by the company by giving notice to that effect, and, if on the cash plan, by tendering therewith a rateable proportion of the premium for the unexpired term, calculated from the termination of the notice: in the case of personal service of the notice, five days' notice, excluding Sunday, shall be given. Notice may be given by any company having an agency in Ontario by registered letter addressed to the assured at his last post office address notified to the company, or where no address notified, then to the post office of the agency from which the application was received; and where such notice is by letter, then seven days from the arrival at any post office in Ontario shall be deemed good notice: And the policy shall cease after such tender and notice aforesaid, and the expiration of the five or seven days as the case may be.

"(a) The insurance, if for cash, may also be terminated by the assured by giving written notice to that effect to the company or its authorized agent, in which case the company may retain the customary short rate for the time the insurance has been in force, and shall repay to the assured the balance of the premium paid." (233)

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(232) Home District Mutual Ins. Co. *vs* Thompson, 1 E. & A., 247.

(233) Condition 19. — Corresponding section of the Fire Insurance Policy Acts of the other provinces of Canada:

British Columbia, stat. cond. nineteen, the same as Ontario, except:
line 2, *written* is inserted before *notice*.
line 4. after word *notice*, the balance of paragraph reads as follows:
five days' personal service of the notice, excluding Sunday, shall be given. And the policy shall cease after such tender and notice aforesaid and the expiration of the five days.

Alberta & Saskatchewan, stat. cond. nineteen, the same as Ontario, except:

A receipt was in the following form:—"The Times and Beacon Assurance Company Agents' Office, Brantford, 3rd. February, 1858. Received from, etc., the sum of $14, being the premium for an insurance to the amount of $2,000 on property described in the order of this date, subject to the approval of the board at Kingston, the said party to be considered insured for twenty-one days from the above date, within which time the determination of the board will be notified. If approved a policy will be delivered, otherwise the amount received will be refunded, less the premium for the time so insured":—It was held, not an absolute insurance for twenty-one days certain, but that the company might within that period reject the risk, and give notice after which their liability would cease. (234)

An interim fire insurance receipt stated that the plaintiff had paid a certain sum for a three months' insurance, subject to the approval of the directors, and declared that the property should be held insured for thirty days from date unless "notified to the

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line 6, *registered under the provisions of The Foreign Companies Ordinance and*, is inserted before *having*.
line 7, 12, *Ontario* reads *the Territories*.
line 10, *the* is omitted before *application*.
line 11, 14, *seven* reads *ten*.
line 14, 1903, *2nd. session, c.* 20, *s.* 5, is inserted at the end.
line 15, Subsection (a) of 19, is omitted.
Manitoba, stat. cond. nineteen, the same as Ontario, except:
line 7, 12, *Ontario* reads *Manitoba*.
line 9, *or* reads *and*.
line 10, *the* is omitted before *application*.
line 11, 14, *seven* reads *ten*.
line 15, Subsection (a) of 19, is omitted.
Nova Scotia, stat. cond. twenty, the same as Ontario, except:
line 1, 6, 8, 16, 17, *company* reads *insurer*.
line 2, *if on the cash plan* is omitted.
line 7, 12, *Ontario* reads *Nova Scotia*.
line 9, *or* reads *and*.
line 9, *has been* is inserted before *notified*.
line 15, Subsection (a) of 19, is numbered s. 21.
line 15, *if for cash* is omitted.
line 17, *its* reads *his*.
(234) Goodfellow *vs* Times & Beacon Ass. Co., 17 U. C. R., 411.

contrary", but that the insurance thereby made was subject to all the conditions, etc., contained in and indorsed on the printed forms of policy then in use by the company. Among these was the 18th statutory condition, providing that the insurance might be terminated by the company by giving ten days' notice to that effect, and by repaying a ratable portion of the premium for the unexpired term, and that the policy should cease after the expiration of ten days from the receipt of such notice and repayment. It was held, that defendants were bound to give the ten days' notice and return a ratable portion of the unearned premium before they could terminate the insurance under the receipt within the thirty days. (235)

B. applied to a mutual company for insurance on his property for four years, giving an undertaking to pay the amounts required from time to time and a four months' note for the first premium. He received a receipt beginning as follows: "Received from B. an undertaking for the sum of $46.50, being the premium for an insurance to the extent of $1,500 on the property described in his application of this date", and then providing that the company could cancel the contract at any time within fifty days by notice mailed to the applicant, and that non-receipt of a policy within the fifty days, with or without notice, should be absolute evidence of rejection of the application. No notice of rejection was sent to B., and no policy was issued within the said time, which expired on March 4th, 1891. On April 17th, B. received a letter from the manager asking him to remit funds to pay his note maturing on May 1st. He did so and his letter of remittance crossed another from the manager, mailed at Owen Sound, April 20th, stating the rejection of his application and returning the undertaking and note. On April 24th the insured property was destroyed by fire. B. notified the manager by telegraph, and on April 29th the latter wrote returning the money remitted by B. who afterwards sent it again to the manager, and it was again returned. B. then brought an action which was

(235) Grant *vs* Reliance Mutual Ins. Co., 44 U. C. R., 229.

dismissed at the hearing and a new trial was ordered by the Divisional Court and affirmed by the Court of Appeal. It was held, affirming the decision of the Court of Appeal, that there was a valid contract by the company with B. for insurance for four years; that the statutory conditions in the Ontario Insurance Act (R. S. O., (1887), c. 167) governed such contract, though not in the form of a policy; that if the provisions as to non-receipt of a policy within fifty days was a variation of the statutory conditions, it was ineffectual for non-compliance with Condition 115, requiring variations to be written in a different coloured ink from the rest of the document, and if it had been so printed the condition was unreasonable; and that such provision, though the non-receipt of the policy might operate as a notice, was inconsistent with condition 19, which provides that notice shall not operate until seven days after its receipt. Held also, that there was some evidence for the jury that the company, by demanding and receiving payment of the note, had waived the right to cancel the contract and were estopped from denying that B. was insured. (236)

In the case of interim insurance by an agent, in the following words: "Received from Messrs. Tough & Wallace, Coaticook, (post office, Coaticook), the sum of $20, being the premium for an insurance to the extent of $500 on the property described in the application of this date numbered... subject, however, to the approval of the board of directors in Toronto, who shall have power to cancel this contract, at any time within thirty days from this date, by causing a notice to that effect to be mailed to the applicant at the above post office."—It was held, that a notice by the company cancelling the contract, mailed to the applicants, at the post office, Toronto, within 30 days, but not received in time for delivery by the post office at Coaticook until after the fire, had not the effect of cancelling the insurance. (237)

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(236) The Dominion Grange Mutual Fire Ins. Ass. *vs* Bradt, 25 Can. S. C. R., 154.

(237) Tough *vs* Provincial Ins. Co., 20 L. C. J., 168.

The insured sent to the company his policy with an indorsed surrender clause, and a letter asking that the insurance be terminated and the unearned proportion of the premium repaid. Owing to its misdirection by the insured, the letter was delayed in the post office and did not reach the company till the morning after the insured property had been destroyed by fire. It was held, that the letter did not take effect from the time of its being posted, but only from the time of its receipt, and that the relationship of the parties had been so changed by the occurrence of the fire before its receipt, that the attempted surrender did not operate and therefore the company was liable for the loss. (238)

About a week before the fire occurred the insured wrote to the company's local agent that they had decided to cancel the existing policy and to have a new one issued for a reduced amount, but this was never communicated to the head office, or any action taken upon it until after the fire had occurred. It was held, that this was not such written notice terminating the insurance as was required by 19a of the statutory conditions, being merely an intimation of the insured to have the existing policy cancelled when a new one was substituted for it, but which was never carried out. (239)

The defendants granted the plaintiff an interim receipt containing the following conditions "subject to... the approval of the directors which will be signified by the issue of a policy within thirty days from date... Notice of rejection of risk received at the post office address of applicant, as given in application, cancels this receipt and insurance if not otherwise conveyed." Held:—That the mere lapse of thirty days without the issuing of any policy, did not put an end to the insurance effected under the receipt. (240)

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(238) Skillings *vs* Royal Ins. Co., 6 O. L. R., 401.

(239) Merchants Fire Ins. Co. *vs* Equity Fire Ins. Co., 9 O. L. R., 241.

(240) Turgeon *vs* Citizens Insurance Co., 9 Q. L. R., 78.

Condition 20. (Ontario).

"No condition of the policy, either in whole or in part, shall be deemed to have been waived by the company, unless the waiver is clearly expressed in writing, signed by an agent of the company." (241)

Vide cases cited under Waiver, supra, p. 125.

Condition 21. (Ontario).

"An officer or agent of the company, who assumes on behalf of the company to enter into any written agreement relating to any matter connected with the insurance, shall be deemed *prima facie* to be the agent of the company for the purpose." (242)

Vide cases collected sub nom Agent, supra, p. 209.

Condition 22. (Ontario).

"Every action or proceeding against the company for the recovery of any claim under or by virtue of this policy, shall be absolutely barred, unless commenced within the term of one year next after the loss or damage occurs." (243)

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(241) Condition 20. — Corresponding section in the Fire Insurance Policy Acts of the other provinces of Canada:

British Columbia, Alberta & Saskatchewan, and Manitoba, stat. cond. twenty, the same as Ontario,

Nova Scotia, stat. cond. twenty-two, the same as Ontario, except: line 2, 4, *company* reads *insurer*.

(242) Condition 21. — Corresponding section in the Fire Insurance Policy Acts of the other provinces of Canada:

British Columbia, Alberta & Saskatchewan, and Manitoba, stat. cond. twenty-one, he same as Ontario, except:

line 1, *An* reads *Any*.

Nova Scotia, stat. cond. twenty-three, the same as Ontario, except: line 1, 2, 4, *company* reads *insurer*.

(243) Condition 22. — Corresponding section in the Fire Insurance Policy Acts of the other provinces of Canada:

British Columbia, Alberta & Saskatchewan, and Manitoba, stat. cond. twenty-two, the same as Ontario.

Nova Scotia, stat. cond. twenty-four, the same as Ontario, except: line 1, *company* reads *insurer*.

A PROVISION THAT THE ACTION MUST BE BROUGHT WITHIN A LIMITED PERIOD FROM THE DATE OF THE LOSS MUST BE STRICTLY COMPLIED WITH.

In the Province of Quebec the contrary of this was held by Smith, J., (244) on the ground that there was no similar prescription in the law of the land which was the law the court was bound to follow.

But this decision was in effect overruled in the following case: Where the policy contained a condition that no suit or "action of any kind against the said company, for the recovery of any claim, upon, under, or by virtue of this policy, shall be sustainable in any Court of Law or Chancery, unless such suit or action shall be commenced within the term of twelve months next after the loss or damage shall occur; and in case any suit or action shall be commenced against the said company after the expiration of twelve months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby attempted to be enforced."

The Court of first instance held that where the action was brought a year and nine months after the fire, this condition afforded a complete bar. The judgment was affirmed by the full court of Queen's Bench, Caron, J., speaking for the court, saying:—

"There was one plea, namely that of prescription, which was sufficiently formidable of itself to decide the case. On this plea the judge in the Court below mainly rested his judgment, and this Court is unanimously of opinion that that judgment should be confirmed. The condition on the policy is express, that the action must be brought within twelve months next after the loss has occurred. In the present instance, one year and nine months had elapsed after the occurrence of the fire before the action was instituted. The Court has nothing to do with the severity of the

(244) Wilson *vs* States Fire Ins. Co., 7 L. C. J., 223.

application of the strict rule established by the condition of the policy,—that is the business of the parties. They made their contract in that sense and they must abide by the consequences. The judgment appealed from is therefore confirmed." (245)

PRESCRIPTIONS.

The condition endorsed on a policy, to the effect that no suit or action shall be sustainable for the recovery of any claim under the policy, unless commenced within twelve months next after the loss shall have occurred, is a complete bar to any such suit or action, instituted after the lapse of that term. (246)

The alleged ruling in Anchor Marine Ins. Co. *vs* Allen, 13 Q. L. R., 4, 16 R. L., 180—that such condition is invalid—questioned and denied in Allen *vs* Insurance Co., in Q. B., which was confirmed in Supreme Court, 15 Can. S. C. R., 488, in which Strong, J., says:

"It has over and over again been adjudged that a provision of this kind is valid and unimpeachable in English law and no authority has been quoted to show that the French law differs in this respect from the English law; on the contrary, numerous French authorities show that the law of France as settled by a general consensus of legal authors, as well as by the jurisprudence of the Court of Cassation, agrees with the law of England."

CORRESPONDENCE RELATING TO THE CLAIM IS NOT A COMMENCEMENT OF AN ACTION.

A condition of the policy was as follows:

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(245) Cornell *vs* Liverpool & London Fire Ins. Co., 14 L. C. J., 256.

(246) Cornell *vs* Liverpool and London Fire and Life Ins. Co., 14 L. C. J., 256; Whyte *vs* Western Ass. Co., 22 L. C. J., 215, 7 R. L., 106; Rousseau *vs* Cie d'Assurance Royale d'Angleterre, M. L. R., 1 S. C., 395; Allen *vs* Merchants Marine Ins. Co., M. L. R., 3 Q. B., 293, 16 R. L., 232; Simpson *vs* Caledonian Ins. Co., Q. R., 2 Q. B., 209.

"All claims under this policy shall be void unless prosecuted within one year from the date of loss."

Held, that correspondence between the insured or persons claiming to represent him, and the insurer, on the subject of a loss, without any admission of liability on the part of the insurer was not a "prosecution" of the claim by the insured within the meaning of the condition.

Allen *vs* Merchants Marine Ins. Co., M. L. R., 3 Q. B., 293.

"AFTER THE LOSS OR DAMAGE OCCURS" CANNOT BE CONSTRUED AS APPLYING TO THE COMPLETION OF THE PROOFS OF LOSS.

A policy of insurance issued by the defendant company on plaintiff's house contained the following among other conditions "Every suit, action, or proceeding against the company for the recovery of any claim under or by virtue of this policy shall be absolutely barred unless commenced within the term of six months next after the loss or damage occurs." The premises insured under the policy were destroyed on the 4th October, 1883, and the action was not commenced until April 18th, 1884.

It was held, that under the condition mentioned, notwithstanding another condition deferring the bringing of any action until after the expiration of sixty days from the completion of the proofs of loss, plaintiff was precluded from recovering.

Also, that the words "loss or damage" in the condition, must be taken to relate to the time of the occurrence of the fire. (247)

A fire insurance policy contained a condition that any action upon it should be barred "unless commenced within the term of six months next after the loss or damage shall have occurred." It was held, that this condition must be considered to refer to the date of the destruction by fire, and not to the date at which the cause of action arose. (248)

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(247) Blair *vs* Sovereign Fire Ins. Co., 7 R. & G., 372; 7 C. L. T., 410.

(248) Peoria Sugar Refining Co. *vs* Canada Fire & Marine Ins. Co., 12 A. R., 418.

But, it was held, that this provision will not apply to a case where the company refused to issue a policy, and it became necessary to file a bill to compel them to execute it.

A condition that any proceedings to be taken against the company in respect of any loss sustained by the assured, should be instituted within six months after such loss should happen: Held, not to apply to a case where the company refused to complete the policy, and a bill was filed to compel them to execute a policy, or pay the loss sustained by destruction by fire of the property insured. (249)

INABILITY TO COMPLY WITH THE PROVISION GENERALLY WILL NOT EXCUSE THE INSURED.

A. insured with a mutual insurance company by a policy expiring on the 26th June, 1863. 29 Vict., c. 37, passed on the 18th September, 1865, enacted that no suit should be brought on any policy after one year from the loss, or one year from passing the Act, if the loss had happened before, saving the rights of the parties under legal disability. To a plea that the loss happened before the Act, and that the action was not commenced within one year from its passing, defendants replied, that when the Act was passed A. was in prison (not saying for felony) and continued there until his death on the 21st February, 1867, and that the action was commenced within a reasonable time after his death. Held, no answer to the plea. (250)

Vide also Hyde *vs* Lefaivre, 32 Can. S. C. R., 474, supra, p. 205.

WAIVER OF THIS CONDITION.

Vide Cousineau *vs* City of London Ins. Co., supra, p. 130.

WHERE WAIVER OR ESTOPPEL IS INVOLVED, *vide* cases collected under Waiver, and Estoppel, supra, pp. 178 and 180.

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(249) Penley *vs* Beacon Ass. Co., 7 Gr., 130.

(250) Tallman *vs* Mutual Fire Ins. Co., of Clinton, 27 U. C. R., 100.

Condition 23. (Ontario).

"Any written notice to a company for any purpose of the statutory conditions, where the mode thereof is not expressly provided, may be by letter delivered at the head office of the company in Ontario, or by registered post letter addressed to the company, its manager or agent, at such head office, or by such written notice given in any other manner to an authorized agent of the company." (251)

RECEIPT OF NOTICE.

The directors of the defendant company, upon consideration of the plaintiff's application, refused the risk and returned to the plaintiff his promissory note, which was enclosed in a letter from the agent informing the plaintiff that his application was not accepted, directed to the post office which was given to the agent by the plaintiff as his address. The plaintiff not having applied to the post office for mail after this letter had been sent, until the fire took place, the court, in giving judgment, said: "It becomes unnecessary to consider the effect of the notification by the agent to the plaintiff that his application was rejected. I only observe in regard to it that it was through his own culpable negligence that he did not receive the letter." (252)

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(251) Condition 23. — Corresponding section in the Fire Insurance Policy Acts of the other provinces of Canada:

British Columbia, stat. cond. twenty-three, the same as Ontario, except:

line 4, *Ontario* reads *British Columbia.*

Alberta & Saskatchewan, stat. cond. twenty-three, the same as Ontario, except:

line 4, *Ontario* reads *the North-West Territories.*

Manitoba, stat. cond. twenty-three, the same as Ontario, except:

line 3, *for* is inserted after *provided.*

line 4, *Ontario* reads *Manitoba.*

Nova Scotia, stat. cond. twenty-five, the same as Ontario, except:

line 1, 4, 5, 7, *company* reads *insurer.*

line 4, *Ontario* reads *Nova Scotia.*

line 4, *registered post letter* reads *letter mailed, postage prepaid and registered.*

(252) Henry *vs* Agricultural Ins. Co., 11 Gr., 125.

Under 36 V., c. 44, s. 38 (O.), it is enacted that whenever a notification in writing shall have been received by a company from a person already insured of his having insured an additional sum on the same property in some other company, the said additional insurance shall be deemed to be assented to, unless the company so notified shall within two weeks after the receipt of such notice signify to the party in writing their dissent. It was held, that under this section the insured must prove not only the sending of the notice, but its actual receipt by the company; and that on the evidence set out in the report, there was no sufficient proof of either the sending of such notice or its receipt. (253)

It was also held that the mere posting of a notice, without showing that it reached the secretary of the company, was not a compliance with the condition requiring that subsequent mortgages should be notified to the company or the policy would be void. (254)

By the terms of the interim receipt, it was provided that the directors should have power to cancel the contract at any time within thirty days "by causing a notice to that effect to be mailed to the applicant" at a specified address. The general manager of the company proved that he directed a letter, declining, to be sent to the plaintiff; that he saw it written and placed with other letters to be sent; and that one H., a clerk in the office, had charge of them, and his duty was to address them to the parties and enter them in the mailing book. The mailing book was produced with an entry in it of this letter; and H. swore that this entry was in his writing, and that he had no reason to doubt that the letter had been mailed. The plaintiff (the insured), however, swore that he had never received it. Per Hagarty, C. J., on this evidence the question of mailing must have been submitted to the jury who should have found that it had been mailed. Per Gwynne, J., a verdict finding otherwise could not have been sustained. (255)

(253) Lyons *vs* Manufacturers & Merchants' Mutual Ins. Co., 28 U. C. C. P., 13.

(254) McCann *vs* Waterloo Mutual Ins. Co., 34 U. C. R., 376.

(255) Johnson *vs* Provincial Ins. Co., 27 U. C. C. P., 464.

It was proved that the plaintiff had mailed the company a notice properly addressed of a further insurance, which the jury found they had received, and that they had not within two weeks thereafter notified the insured of their dissent. Held, that the notice must be presumed to have reached the company as there was no evidence of its non-receipt; and that under 36 V., c. 44, s. 38 (O), they must be deemed to have assented to it, no dissent having been signified by them within two weeks after the time when the notice would have been received in regular course. (256)

Variations and Additions.

The statute provides, supra, p. 354, that variations and additions to the statutory conditions shall only be in force so far as by the Court or Judge, before whom a question is tried relating thereto, they shall be held to be just and reasonable to be exacted by the company, and then only in the event of their being printed in conspicuous type and in ink of a different colour and with the notice mentioned in the statute.

Conditions dealing with the same subjects as those given by the statute and being variations of the statutory conditions should be tried by the standard afforded by the statute and held not to be just and reasonable if they impose upon the insured terms more stringent or onerous or complicated than those attached by the statute to the same subject or incident. (257)

The reasonableness of a condition is to be tested with relation

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(256) Shannon *vs* Hastings Mutual Ins. Co., 26 U. C. C. P., 380; 2 A. R., 81.

Vide also Dominion Grange Ins. Co. *vs* Bradt, supra, p. 476.

(257) Butler *vs* The Standard Ins. Co., 4 A. R., 391.

May *vs* The Standard Ins. Co., 5 A. R., 605.

Ballagh *vs* The Royal Ins. Co., 5 A. R., 87.

Smith *vs* City of London Ins. Co., 14 A. R., 328; aff. 15 Can. S. C. R., 69, per Ritchie, C. J., & Strong & Fournier, JJ., Gwynne, J., dissenting.

to the circumstances of each case at the time the policy is issued. (258)

SIZE OF TYPE.

Where, in a policy, variations from the statutory conditions were printed in type of the same size and shape of the statutory conditions, but in bright scarlet, whereas the latter were in black ink. Held, that the requirements of sec. 169 of the Ontario Insurance Act, R. S. O., 1897, c. 203, were sufficiently complied with. (259)

FAILURE TO INDICATE VARIATIONS.

In an action on a fire policy, upon which the statutory conditions were not indorsed, but which was on its face declared to be subject to the company's conditions indorsed, the eleventh provided that the insured should do all in his power to save and protect the insured property, and prevent injury thereto. By the seventeenth condition the non-fulfilment of these conditions entailed the forfeiture of the policy. The jury found specially, amongst other things, that the plaintiff wilfully neglected to save, and prevented others from saving, the insured property, whereby his goods were prevented from being saved, but they disagreed as to the defence of fraudulent over-valuation. It was held, that under the decision of the Privy Council in Parsons *vs* Citizens' Ins. Co., 7 App. Cas., 96, the policy must be taken to be a policy with the statutory conditions only; and a new trial was granted that the case might proceed as upon such a policy. (260)

Where a fire insurance policy does not contain the statutory conditions, but contains other conditions not printed as varia-

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(258) Smith *vs* City of London Ins. Co., supra p. 485.
McKay *vs* Norwich Union Ins. Co., *infra*, p. 493.
Ballagh *vs* The Royal Ins. Co., 5 A. R., 87.
(259) Lount *vs* London Mutual Ins. Co., 9 O. L. R., 549.
(260) Devlin *vs* Queen Ins. Co., 46 U. C. R., 611.

tions, it must be read as containing the statutory conditions and no others. Citizens Ins. Co. *vs* Parsons, 7 App. Cas., 96, followed. And the law in this respect has not been altered by 55 V., c. 39, s. 33 (O). Where, in the application, the insured was asked whether any incendiary danger to the property was threatened or apprehended, and untruly answered "no", Held, that the policy was avoided. (261)

VARIATION TO CONDITION 1.

NON-DISCLOSURE OF TITLE OR INCUMBRANCES.

The plaintiff and his brother, being joint owners of land which their father had conveyed to them, subject to a mortgage to C., gave a mortgage to the father to secure the balance of purchase money, the father covenanting to pay C's mortgage. Under an agreement with his father and brother, the plaintiff, who was a carpenter, at his own expense built a dwelling-house for his own use on a quarter of an acre of the land, the agreement being that, if the brothers should not be able to pay for the land, the plaintiff should have the house as his own. The house was placed on blocks of wood, and was held by its own weight on them. The plaintiff, in his application for insurance on the house and contents, in answer to the question "Title, held in fee, or how?" answered "In fee"; and to the question "Incumbered or not? If yes to what amount—how much land does incumbrance cover, and for what purpose created?" he answered "None". But he stated to the agent that there was on the land a mortgage, but nothing against the house, which he held in fee unincumbered.

There was a variation to the statutory condition indorsed on the policy that incumbrances should be disclosed and that the failure to do so would void the policy. No question was raised as to the reasonableness of the variation.

Held, that the house was not insured as a chattel but as real-

(261) Findley *vs* Fire Ins. Co. of N. A., 25 O. R., 515.

ty; and that the failure to disclose the incumbrance was fatal. (262)

A condition was added by the company that if the assured should make any misrepresentation or concealment, or omit to make known any fact material to the risk, or make any untrue statement as to ownership or title, the policy should be void—without providing, as in the statutory condition, that such misrepresentation must be material to the risk, and should void the insurance only as to the property affected by it.

Per Patterson, J., agreeing with Spragge, C. J., such condition was unreasonable, and was in effect declared to be so by the statute. (263)

The defendants, in the prescribed manner, indorsed upon the plaintiff's policy as an addition to the first statutory condition, a condition providing that any fraudulent misrepresentation in the application, or any false or incorrect statement respecting the title or ownership of the applicant, or the concealment of any mortgage or execution or any incumbrance on the property or on the land on which it was situate, should avoid the policy unless the directors in their discretion should see fit to waive the defect. In his application the plaintiff stated that the land on which the building proposed to be insured was situated was incumbered by a mortgage for $1,500, but omitted to disclose that it was also charged, together with other property, with a small annuity in favour of his father. The omission was not explained, but it was not attributed to any fraudulent intent. The defendants pleaded that the non-disclosure of that charge avoided the policy under the first statutory condition, or the above addition thereto. The jury found that the existence of the annuity was not material to be made known to the defendants. Held, affirming 14 O. R., 506: (1) That the non-disclosure of the annuity was the concealment of an incumbrance within the mean-

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(262) Phillips *vs* Grand River Farmers' Mutual Fire Ins. Co., 46 U. C. R., 334.

(263) Butler *vs* Standard Fire Ins. Co., 4 A. R., 391.

ing of the added condition. (2) That the added condition was not a just and reasonable one because it was not limited to such facts or matters as were material to be made known to the company. (3) That the divisional court might determine whether the condition was a just and reasonable one, and that it was not necessary that it should first have been raised at the trial. (264)

A policy provided, by way of variation of statutory condition 1, that any incumbrance by way of mortgage should be deemed material to be known to the company within the meaning of the said statutory condition. It was held, that this was too wide to be just and reasonable, and that the Court had to determine whether the non-disclosure of the mortgage was a material fact, the onus being on the defendants who asserted its materiality. (265)

VARIATION TO CONDITION 3.

THE WORD "AGENT" MAY BE ALTERED TO READ "COMPANY'S SECRETARY ONLY".

A variation from the statutory conditions striking out from the third statutory condition the words "or its local agent" in the clause requiring notice of a change material to the risk to be given to "the company or its local agent" and providing that wherever the words "agent" or "authorized agent" occur in the statutory conditions such agent or authorized agent shall be held to mean the company's secretary only, was, in the case of a company having its head office in the Province of Ontario and more than four hundred local agents in the Province, held, as to the third statutory condition, to be just and reasonable, and notice to a local agent insufficient. (266)

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(264) Reddick *vs* Saugeen Mutual Fire Ins. Co., 15 A. R., 363.

(265) Lount *vs* London Mutual Fire Ins. Co., 9 O. L. R., 549, Street, J.

(266) Lount *vs* London Mutual Fire Ins. Co., 9 O. L. R., 699.

CONDITION AGAINST ALIENATION HELD UNREASONABLE.

By a condition in a policy of insurance additional to the statutory conditions, it was provided that "when property insured... or any part thereof shall be alienated, or in case of any transfer or change of title to the property insured, or any part thereof, or of any interest therein without the consent of this company indorsed hereon, or if the property hereby insured shall be levied upon, or taken into possession or custody under any legal process, or the title be disputed in any proceeding at law or equity, this policy shall cease to be binding upon the company." It was held, that such condition was not just or reasonable, and that it was not binding. (267)

VACANCY CASES.

A CONDITION THAT VACANCY FOR TEN DAYS SHOULD VOID THE POLICY, HELD REASONABLE.

The defendants issued a policy of insurance against fire, dated 23rd April, 1889, upon a house of the plaintiff. The application, signed by the plaintiff, stated that the house was occupied as a residence by the plaintiff's son. A fire took place on the 14th November, 1889, at which date and for six months previously the house had been unoccupied. One of the special conditions indorsed upon the policy was that if a building became vacant or unoccupied and so remained for ten days, the entire policy should be void. The plaintiff and his wife swore that when the agent came to him and drew the application, he asked the plaintiff if there was any one in the house at the time, and the plaintiff told him that his son was living there at the time, but was going to leave in about two weeks, and asked if that would make any difference, and was informed by the agent that it would not. By a clause in the application, the plaintiff agreed that no statement made or information given by him prior to issuing the policy to any agent of the defendants, should be deemed to be made

(267) Sands *vs* Standard Ins. Co., 27 Gr., 167.

to or binding upon the defendants unless reduced to writing and incorporated in the application; and on the margin of the application there was a notice showing that the powers of agents were limited to receiving proposals, collecting premiums, and giving the consent of the defendants to assignments of policies. Held, that the special condition referred to was not an unreasonable one, and that the agent had no power to vary it; and an action to recover the amount of the loss was dismissed. The plaintiff at the trial sought to give evidence of certain transactions between the agent of the defendants and a brother of the plaintiff, for the purpose of showing that the plaintiff, having become aware of them before the application made by him, was justified in believing that the defendants did not regard the conditions as to occupation as a material one. It was held, that this evidence was properly rejected. (268)

A variation of statutory condition 3 in a policy of fire insurance providing that "if the premises insured become untenanted or vacant and so remain for more than ten days without notifying the company", etc., "the policy will be void", is a reasonable condition, and the word "untenanted" therein must be read as synonymous with "unoccupied". Where, therefore, the occupant of a house ceased to reside in it for several weeks, but left furniture and clothing therein, while a person went there for domestic purposes, and on two occasions the insured's husband slept in the house, it was held that the house was untenanted and vacant within the meaning of the condition. (269)

BUT A CONDITION THAT IF THE PREMISES (DWELLING-HOUSES) SHOULD BECOME VACANT THE POLICY WILL BE VOID, IS UNREASONABLE.

The defendants insured seven houses belonging to the plaintiff, which had been mortgaged by him to a loan company, and which were described in the policy as "a two-story frame, rough-

(268) Peck *vs* Agricultural Ins. Co., 19 O. R., 494.
(269) Spahr *vs* North Waterloo Ins. Co., 31 O. R., 525.

cast, felt-roofed block... containing seven dwellings, six of which are occupied by tenants, and one by assured." In the application, filled up by defendants' agent, the question as to how many tenants was answered "six tenants and applicant", the agent informing defendants that "the largest house of the lot the applicant will occupy himself." A variation of the statutory conditions was printed on the policy in these words: "This policy will not cover vacant or unoccupied buildings (unless insured as such), and if the premises shall become vacant or unoccupied... this policy shall cease and be void unless the company shall by indorsement... allow the insurance to be continued." A fire occurred by which the houses were destroyed, and the defendants paid the loan company the amount of their mortgage, under a prior general agreement with them by which the policy was to be treated between the parties to the agreement as unconditional except as to the mortgagor, and whereby the defendants were entitled, upon payment to the loan company under the policy or otherwise of any loss as to which they claimed to have a defence against the mortgagor, to be subrogated to the loan company's rights and to have the mortgage assigned to them. For some months prior to the fire several of the houses became and remained vacant, of which the plaintiff was aware, but of which he did not notify the defendants. In an action by plaintiff upon the policy: Held, that the actual facts as to occupancy being before them at the time of the application, the defendants were liable, nor were they relieved by their variation of the statutory conditions that the policy would not cover vacant unoccupied houses: Held also, that the variation as to the premises becoming vacant or unoccupied where, as here, the houses were of a class likely to be occupied by tenants for short periods, was unreasonable, and the reasonableness of the variation was to be tested with relation to the circumstances at the time the policy was issued. It was held, that the fact that several of the houses were vacant to plaintiff's knowledge for some months before the fire, was, under the third statutory condition, a change material to the risk, which

was thereby increased, and the failure to notify the defendants avoided the policy "as to the part affected", which in this case was the whole block. Held also, that the meaning of the word "risk" in the third statutory condition is not distinguishable from the same word in the first statutory condition, and that subsequent mortgages executed by plaintiff were matters relating to title, and were not covered. (270)

VARIATION TO CONDITION 4.

Vide addenda et corrigenda supra.

VARIATION OR ADDITION TO CONDITION 9.

PARTIAL LOSS.

The insurance was upon goods valued in the application at $15,000. The policy was dated the 11th June, 1902, and the fire occurred on the 12th July following, with the loss of $6,250. The defendant's policy was for $3,000; there was other insurance to the amount of $7,000, and the total value of the goods at the time of the fire was $9,274.62. Statutory condition No. 9 provided that "in the event of any other insurance on the property herein described having been assented to as aforesaid, then this company shall, if such other insurance remains in force, on the happening of any loss or damage only be liable for the payment of a ratable proportion of such loss or damage, without reference to the dates of the different policies." A special condition was endorsed on the policy as follows: "The assured shall not be entitled to recover from this company more than two-thirds of the actual cash value, unless more than such two-thirds value, as represented in the application, shall have been insured, in which case the company shall be liable for such proportion of the actual value as the amount insured bears to the value given in the application. In the case of property other than buildings, if the property insured is found, by arbitration or otherwise, to have been overvalued in the application for this policy, the company shall be liable (in the absence of fraud) for such proportion of the actual value as the amount

(270) McKay *vs* Norwich Union Ins. Co., 27 O. R., 251.

insured bears to the value given in the application." Held, that the special condition was inapplicable to the case of a partial loss, and that the plaintiff was entitled to recover from the defendants three-tenths of the amount of his loss in accordance with statutory condition No. 9. (271)

ABATEMENT BASED ON SUBSEQUENT INSURANCE.—LIMITATION OF AMOUNT RECOVERABLE.

The fourth variation was, that in no case should the insured be entitled to recover more than two-thirds the actual value of any building or contents or other property insured; nor in case of further insurance by the insured or other party more than the ratable proportion of two-thirds of the actual value without reference to the date of the different policies; that any general policy on different properties shall be treated as a special policy on each property for the whole amount thereby insured. The insurance was $100 on barn and stables valued at $1,200, and $900 on contents valued at $3,000. It was held, that as to the latter part of the condition referring to further insurance by the insured or other party, it was unjust and unreasonable; but as to the former part thereof, as to the payment of not more than two-thirds of the value of the property insured—which meant at the time of loss—it was just and reasonable. (272)

CO-INSURANCE CLAUSE HELD REASONABLE.

Where the premium is reduced in consideration of the insertion in a policy of fire insurance, in the manner prescribed by the Ontario Insurance Act, R. S. O., c. 203, s. 169, of the condition commonly known as the "co-insurance condition", that condition is *primâ facie* valid and should not be held to be "not just and reasonable" within the meaning of s. 171 of the Act, without evidence to that effect. (273)

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(271) Eacrett *vs* Gore District Mutual Ins. Co., 40 C. L. J., 30.

(272) Graham *vs* Ontario Mutual Ins. Co., 14 O. R., 358.

(273) Eckhardt *vs* Lancashire Ins. Co., 27 A. R., 373, (affirmed by Supreme Court of Canada, November 13, 1900).

The defendant company delivered to the plaintiffs a policy of fire insurance containing this provision: "It is a part of the consideration of this policy, and the basis upon which the rate of premium is fixed, that the assured shall maintain insurance on the property covered by this policy, of not less than seventy-five per cent of the actual cash value thereof, and that failing to do so, the insured shall be a co-insurer to the extent of such deficit, and in that capacity shall bear his, her, or their proportion of any loss." It was held, that this was in the nature of a condition and was invalid if not printed in the manner provided by sec. 115 of R. S. O., c. 167. (274)

VARIATION TO CONDITION 13.

13 (b).

Upon a policy issued by a mutual company the statutory conditions were indorsed with variations, one of which was (being the same as s. 56 of the Mutual Act, R. S. O., 1877, c. 161), that the proofs, declarations, etc., called for by the statutory conditions, should be furnished to the company in writing within thirty days after the loss. The loss occurred on the 2nd October, 1878, and on the fifth the plaintiff notified the defendants by letter. A few days after the plaintiff saw one S., an agent of the defendants for obtaining applications, though not for collecting claims, but one who had acted for plaintiff in settling a previous loss with defendants, and asked him to act for him on this occasion and do what was proper, which S. promised to do. On 17th October the defendants' president came up and saw plaintiff, who informed him of the loss, and of all the circumstances relating thereto, and plaintiff was told by him in answer to his inquiry that nothing further need be done. The plaintiff in consequence did nothing; but subsequently, on the plaintiff hearing that the defendants disputed the claim, some correspondence took place, which resulted in the

(274) Wanless *vs* Lancashire Co., 23 A. R., 224.

plaintiff employing a solicitor, and proofs were thereupon put in, but after the lapse of thirty days. It was held, that s. 2 of R. S. O., 1877, c. 162, relieving the insured under certain circumstances from forfeiture for non-delivery of the proofs of claim, applies to mutual insurance companies, and to the time of delivery as well as insufficiency in the proofs. Held also, under the facts set out in the report, that the omission to deliver the proofs in proper time arose from accident or mistake, within the meaning of that clause. (275)

13 (e)

After 36 V., c. 44, which gave relief in Mutual Company cases, it was held that a condition that the certificate should be from the magistrate most contiguous to the place of fire was unreasonable and accordingly it was declared null and void. (276)

VARIATION TO CONDITION 16.

Vide addenda et corrigenda supra.

VARIATION TO CONDITION 17.

Where the statutory condition provided that no action should be brought until 30 days after the proofs of loss, it was held that a variation altering the word "thirty" to "sixty" was not just or reasonable. (277)

In the body of the policy, after stating that it was made subject to the conditions therein contained or thereon indorsed, that is to say, the statutory conditions, as varied by the conditions thereunder written, etc., it was added, "In case of loss payment shall be made within sixty days after completion of the proof of loss in accordance with said conditions." It was held,

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(275) Robins *vs* Victoria Mutual Fire Ins. Co., 6 A. R., 427.

(276) Shannon *vs* Hastings Mutual Ins. Co., 2 A. R., 81; 2 Can. S. C. R., 394.

(277) Smith *vs* City of London Ins. Co., 14 A. R., 328; 15 Can. S. C. R., 69.

Vide also Hartney *vs* North British Fire Ins. Co., 13 O. R., 581.

that this was a condition, and that not being headed in accordance with the statute, it could not vary the 17th statutory condition indorsed, which required payment in thirty days. (278)

VARIATION TO CONDITION 22.

A variation reducing the time for bringing the action to six months is unjust and unreasonable. (279)

VARIATIONS GENERALLY.

A provision in the body of the policy exempting from prairie fires, is invalid, and should appear as a variation.

The policy contained in the body of it the words "The company is not responsible for loss caused by prairie fires", and defendants contended that, as plaintiff had alleged the contract of insurance to be an absolute one, he could not recover without an amendment setting up the policy correctly and proof that the loss was not caused by a prairie fire. Held, that such qualification or exception to the absolute contract of the company must be regarded as a condition of the insurance within the meaning of the Act, and that as it was not one of the statutory conditions it would be legal and binding on the assured only if it were indicated and set forth on the policy in the manner prescribed by the Act, which it was not, and in pleading the plaintiff might ignore it altogether as he had done. (280)

A VARIATION REQUIRING THE PREMIUM TO BE PAID IN CASH IS REASONABLE.

A premium note dated the 24th May, 1880, given on effecting an insurance with the defendant company, stated that the in-

(278) Sauvey *vs* Isolated Risk and Farmers' Fire Ins. Co., 44 U. C. R., 523.

(279) Merchants Fire Ins. Co. *vs* Equity Fire Ins. Co., 9 O. L. R., 241.

(280) Green *vs* Manitoba Ass. Co., 13 Man. R., 395.

sured for value received on policy No. 1, 405, dated the 6th May, 1880, promised to pay the company $14.50 on the 24th December, 1880, with interest at seven per cent., and contained an agreement that if the note were not paid at maturity, the whole amount of the premium should be considered as earned, and the policy should be null and void so long as the note remained unpaid. Upon the policy, which was dated the 14th May, 1880, and took effect from the 24th May, 1880, was indorsed a variation condition that the policy should not be valid or binding until the premium was actually paid, unless credit was given for it; and in that case it was a condition of the contract "that if such premium be not paid....18...., the whole amount of premium shall then be considered as earned, and the policy shall be null and void, so long as any part thereof remains unpaid". The application, which was made a part of the policy, stated that the premium was due on the 24th December 1880. It was held, that the omission to fill up the blank in the condition, did not prevent its operating, for the condition would be perfect without the figures "18" which might be rejected as surplusage; but that the condition could be reformed by inserting the words and figures evidently intended—namely, the 24th December, 1880; or might have been filled up by the parties. Held also, that the condition was not unreasonable, being in effect the same as that provided for in the case of mutual insurance companies by R. S. O., 1877, c. 161. (281)

So also is a variation providing that the non-payment of a note given for a cash premium should void the policy.

Ballagh *vs* Royal Mutual Ins. Co., 5 A. R., 87.

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(281) Sears *vs* Agricultural Ins. Co., 32 U. C. C. P., 585.

CHAPTER IX

MUTUAL INSURANCE.

History. — Principles. — Legislation in different provinces. — Assessments. — Cash premium insurance. — Municipal County Insurance, Quebec. — Municipal Mutual Insurance, Quebec. — Diocesan Mutual Insurance, Quebec. — Butter and Cheese Factories Insurance, Quebec. — Live Stock Insurance, Ontario.

Very early in the history of Canada the importance of insurance was realized by the community generally. Whether it was by reason of the difficulty of obtaining insurance from the limited number of regular fire insurance companies carrying on business in Canada or not, the fact remains that in 1834 in Lower Canada, in 1836, in Upper Canada, legislation was passed making provision for the organization of Mutual Insurance Companies.

Principle of Mutual Insurance.

"The leading principle of Mutual Insurance Companies, and that which constitutes their essential difference from Proprietary Companies, is, that each person whose property is insured becomes a member of the Company. The several members are, as the name indicates, insurers of each other; their capital consists of such amount of premiums as by their Act of Incorpora-

tion they are required to have subscribed before commencing business, the deposit notes given therefor, and for such other insurances as are effected from time to time by the increasing number of members, and of a lien upon the land and premises of each member upon which insurances are effected for the full liability of such member. The Act of 6 Wm. IV., ch. 18, passed for the purpose of authorizing the establishment of Mutual Insurance Companies in this Province, kept the fundamental principles upon which such Companies came to be established scrupulously in view, and it is, I think, much to be lamented, having in view the security of those insuring, that the Legislature should have ever sanctioned any real or apparent departure from those fundamental principles." (1)

To clearly apprehend the earlier decisions, it may be worth while to state briefly the main provisions of the Mutual Companies Acts as they appear in the Consolidated Statutes of Upper and Lower Canada, and the amendments which were from time to time made.

In Upper Canada forty, and in Lower Canada, sixty, persons, who signed the subscription book, were sufficient to authorize the incorporation of a Mutual Insurance Company, which company might insure dwelling-houses, stores, shops and other buildings, household furniture and merchandise against loss or damage by fire, whether happening by accident, lightning or by any other means, except that of design in the insured, or by the invasion of an enemy, or by an insurrection.

The legislation for Upper Canada authorized the business being separated into two departments, hazardous and non-hazardous, and the directors were authorized to make a scale of risks for each branch, keep the accounts separate, and that the members insuring in one branch should not be liable for any claims on the other branch.

The characteristic method of paying and securing the pay-

(1) Gwynne, J., Storms *vs* Can. Farmers' Mutual, 22 U. C. C. P., 75.

ment of losses provided for in the legislation of both provinces was the giving by the members of promissory notes payable on demand before they received their policies, for a sum of money proportioned according to the classification of risk established by the directors. A part of the sum secured by the note was made payable at the time the risk was taken and the balance was liable to assessment from time to time to pay the losses and liabilities incurred by the company during the currency of the policy.

Another essential element which at first characterized these mutual insurance companies was the provision by which the real property of the members became hypothecated as security for the payment of its losses.

S. 12 of the Lower Canada Act, (C. S. L. C., c. 68), provided that "All real property belonging to the insured at the time of the date of the policy or during the continuance thereof shall be hypothecated to the company from the date of the policy for the amount of the deposit note given to the directors by the party insured."

And in addition, by s. 24, if all the deposit notes were insufficient to pay the losses, each member became liable to pay an additional assessment of one dollar in two hundred, if required.

In Upper Canada, s. 67 of the Act, (C. S. U. C., c. 52), provided that "All the right and estate of the assured at the time of the insurance to the buildings insured by the company, to the lands on which the same stand, and to all other lands thereto adjacent mentioned and declared liable in the policy of insurance, shall stand pledged to the company; and the company may sell, demise or mortgage the same or any part thereof, to meet the liabilities of the assured for his proportion of any losses or expenses accruing to the company during the continuance of his policy."

And s. 80 contained a provision similar to that in Lower Canada by which an additional assessment to the extent of one per cent. might be made upon the assured.

SECURITY FOR POLICY-HOLDERS.

In both provinces, inasmuch as the security of a policy-holder rested largely upon the real property of the members, provision was made by which a change in title or the addition of incumbrances voided the policy. The Consolidated Statutes of Lower Canada, c. 68, s. 25 provided as follows:

"25. Any such company may insure by the same policy, and at one time, for any term not exceeding five years, and any policy of insurance issued by the company, and signed by the President, and countersigned by the Secretary, and in the form in the Schedule A of this Act, shall be valid and binding on the company in all cases where the insured party has, at the time the damage occurs, the title or estate described by him at the time of effecting the insurance, to the land on which any property damaged by fire is situate; but if the insured has a less title or estate in such property, or if the same is incumbered otherwise than described as aforesaid, the policy shall be void; and the description of every such title or estate or incumbrance, shall be written on the back of the policy, and signed by the President and Secretary of the company."

While Consolidated Statutes of Upper Canada, c. 52, s. 27, provided that:

"27. If the assured has a title in fee simple unincumbered to the building or buildings insured, and to the land covered by the same, any Policy of Insurance thereon issued by the company, which is signed by the President and countersigned by the Secretary, shall be deemed valid and binding on the Company, but not otherwise; but if the assured has a less Estate therein, or if the premises be incumbered, the Policy shall be void, unless the true title of the assured, and of the incumbrance on the premises, be expressed therein and in the application therefor."

In White *vs* The Agricultural Mutual Ass. Co., (2) Mr. Jus-

(2) 22 U. C. C. P., 98.

tice Gwynne in his reasons for judgment points out that the two sections of the consolidated act, 27 and 67, had been separated from their natural context in the original Act, 6 Wm. IV., c. 18, (Upper Canada), and if read together showed that the reason for voiding the policy where title or incumbrances were either incorrectly stated or concealed, lay in the fact that the real property of the insured was pledged to the company as security for its losses and expenses, and that the lien only attached upon policies of mutual insurance, where the insured became members of the company and liable as such to contribute to its losses, but that such lien has no place in the case of a policy issued for a cash premium, which, being once paid, discharges the insured from all liability, and that the persons insured upon this principle, not being, in virtue of their policies, members of the company, are not liable to any future demands or liabilities.

The Mutual Insurance Companies Acts of Quebec were consolidated in 1882, by 45 V., c. 51. The provisions of that Act are substantially contained in the Revised Statutes of 1888, and as in Ontario, the two sections of the old act, 4 Wm. IV., relating to title and incumbrances and the hypothecation of the member's lands as security for his premium note, were separated and are contained in articles 30 and 49.

In the consolidated statutes alienation by sale or otherwise, in both provinces, voided the policy, but the grantee or alienee might have the assigned policy confirmed to him by the company. (C. S. L. C., c. 68, s. 28; C. S. U. C., c. 52, s. 30).

In both provinces also, alterations which affected the insurance or exposed the insured property to greater risk from fire, voided the policy. (C. S. L. C., c. 68, s. 29; C. S. U. C., c. 52, s. 34).

Double insurance without the consent of the company also voided the policy in both provinces, but in Upper Canada there was an additional provision that the assent of the company should be assumed unless the company dissented within two

weeks after receipt of notice of the subsequent insurance. (C. S. L. C., c. 68, s. 30; C. S. U. C., c. 52, s. 28).

S. 22 of the Lower Canada Act provided that the member failing to pay his assessment should not be entitled to recover for any loss, but nevertheless the amount due on his deposit note might be recovered.

In Upper Canada, there was no provision voiding the policy for non-payment of the assessment until the amendment made in 1865, by 29 V., c. 37, s. 5.

In both provinces, there was a provision, somewhat more elaborately provided for in Lower Canada than in the other province, by which, upon a loss occurring notice was required to be given to the company, and if the insured and the company could not agree, an *expertise* or arbitration was provided for; and it was only after the award had been made that an action would lie, while a further provision in Upper Canada restrained the issue of execution until six months after judgment.

In Ontario when the Mutual Companies Acts were consolidated in 1873, 36 V., c. 44, it was provided by s. 69 that any lien for the premium note or undertaking upon lands upon which the insured property was situate should cease after the Act came into effect.

But the provisions in the earlier acts with respect to voiding the policy for misrepresentation as to title or incumbrances, or alienation by sale or otherwise, were continued by secs. 36 and 39.

Apparently the Legislature, in view of the fact that the insurance had ceased to be a charge upon the lands, deemed it advisable to abrogate these provisions relating to title and incumbrances, and by 39 V., c. 7, the provisions of s. 36 of 36 V., c. 44, were eliminated.

S. 39 however was retained, by which it was provided that in case any property, real or personal be alienated by sale, insolvency or otherwise, the policy should be void, but made provision that in case of a sale or mortgage with the assent of the company, the assignment of the policy might be ratified.

The provision voiding policies in mutual companies for alienation, which was carried into the Revised Statutes of 1877, as c. 161, s. 41, was dropped in the Consolidation of 1887, 50 V., c. 26.

After the Fire Insurance Policy Act was brought into force, it was held in a number of cases, and finally affirmed in the Supreme Court in Frey *vs* Mutual Ins. Co. of Wellington, that the statutory conditions had no application to mutual insurance companies, and the Legislature thereupon proceeded to provide by express legislation, 44 V., cap. 20, that the Fire Insurance Policy Act should so apply.

In Ontario the provision as to arbitration to settle the amount of loss which was to precede any action was dropped in the Consolidation of 1887, 50 V., c. 26, as the general provisions of the statutory conditions by this time had been made applicable to Mutual Insurance Companies.

By this last Act all the original features which characterized mutual insurance in Ontario were swept away, except the enactments for organizing companies, and the assessment of premium notes.

These provisions are now contained in the Ontario Insurance Act, R. S. O. 1897, c. 203.

In Quebec, on the other hand, the provisions hypothecating the members' immoveable property as security for their premium notes, and making the policy void where there was a change of title, or where the property was incumbered, and the special provisions for *expertise,* were retained and continued in the Revised Statutes in articles 5303, 5307, 5308 and 5322.

The effect of the Quebec Insurance Act, 8 E. VII, c. 69, upon these and other sections of the Revised Statutes of Quebec are discussed, *infra,* p. 561.

Statutory Conditions.

Legislation providing for the organization of and carrying on of business by Mutual Fire Insurance Companies has been passed in the Provinces of Manitoba, British Columbia, Alberta

Saskatchewan and Nova Scotia. This legislation in its main features, is similar.

But whereas in all the provinces of Canada except Nova Scotia, the statutory conditions are expressly made applicable to Mutual Insurance Companies (3), no such provision is contained in the Nova Scotia statute, (3 & 4 E. VII., c. 46) and the statutory conditions in that province, therefore, have no application to policies issued on the purely mutual system. That this is the fact is made abundantly clear by the following considerations and is supported by judicial decision. (4)

S. 31 provides as follows: "Every condition indorsed upon or affecting any policy of insurance which shall be held by the court or judge before whom any question relating thereto shall be tried not to be just and reasonable, shall be absolutely null and void."

A clause such as this is quite inconsistent with the terms of the Fire Insurance Policy Act, R. S.N. S. c. 147. It is in fact a reproduction of the provision relating to variations at the end of s. 9. of that act, which provides that variations shall only be in force so far as the court or judge may deem them reasonable.

S. 34 makes misrepresentation in the application, false statements as to title or ownership, concealment of incumbrances, failure to notify the company of change of title, a cause for voiding the policy, whereas by the statutory conditions 1 and 3, such matters only void the policy when the same are material to be made known to the company.

Ss. 35 and 36 void the policy for double insurance. A similar provision is contained in the statutory condition No. 9.

S. 37 voids the policy for alienation, although, where the policy is transferred to a mortgagee, the transfer may be allowed

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(3) R. S. O. 1897, c. 203, s. 166; R. S. M., c. 85, s. 43; Con. Ord. N. W. T., c. 120, s. 71; B. C., 2 E. VII., c. 35, s. 57; Quebec, 8 E. VII., c. 69, Sec. XX, art. 203.

(4) Ballagh *vs* The Royal Mutual, 5 A. R., 87; Frey *vs* The Mutual of Wellington, 5 Can. S. C. R., 82.

by the directors, and the use of the word "alienation" in this section therefore, includes a mortgage, whereas alienation in the 4th statutory condition, as has been pointed out supra, p. 405, means an absolute transfer of the property.

S. 38 voids the policy for changes material to the risk. This is covered by the 3rd statutory condition.

S. 50 provides for notice of proofs of loss. Much more elaborate provisions are contained in statutory conditions Nos. 14 and following.

S. 51, makes provision for arbitration, the same matter being covered by statutory condition No. 17.

S. 52 prescribes the action after one year. A similar provision is contained in the statutory condition No. 24.

In perusing the legislation in Ontario contained in 36 V. c. 44, which consolidated the Mutual Insurance Acts of that province, similar provisions will be found to those in the Nova Scotia Statute. It was not until 1876, by 39 V. c. 24, that the Fire Insurance Policy Act came into force in Ontario, and it was only made applicable to Mutual Insurance Companies in 1881, by 44 V. c. 20, s. 28. It would appear, therefore, that the intention of the Legislature in Nova Scotia was to introduce into that province the law of mutual insurance substantially as it was in Ontario under 36 V. c. 44. Whether intended so or not, that would appear to have been the result of this legislation, and the decisions of the Ontario courts in mutual insurance cases prior to 1881, and also the Quebec decisions, are applicable in cases arising under the Nova Scotia Act.

Quebec Insurance Act. (8 E. VII, c. 69).

The provisions of the Quebec Insurance Act relating to Mutual Insurance are hereinafter set out, accompanied by references to the corresponding sections in the legislation of the other provinces, and the jurisprudence of the courts thereon.

WHEN COMPANIES MAY ISSUE POLICIES.

Quebec Insurance Act, art. 172 (*R. S. Q. art.* 5302).

"No policy shall be issued by any company formed under section II of this act, until applications have been made for insurance to the extent of two hundred thousand dollars at least, and approved of by the board of directors, and until deposit notes to the amount of at least ten thousand dollars have been *bonâ fide* signed and delivered to the company.

"The board of directors shall in no case issue a policy for an amount exceeding five thousand dollars on one risk, unless the amount of the excess is re-insured, or allow the amount of insurance effected in any one city or town to exceed fifteen per cent. of the total insurances effected by the company."

This article contains all of art. 5302 R. S. Q., with an additional provision requiring deposit notes to the amount of $10,000 to be delivered to the Company, and limiting the amount of each policy to $5,000.

SEPARATION OF BUSINESS INTO CLASSES.

Quebec Insurance Act, art. 173 (*R. S. Q. art.* 5291).

"The company may, by a by-law, separate its business into two classes or departments, with reference to the nature or classification of the risks to be insured, or of the particular localities in which insurances may be effected, which shall be known as the 'farm and isolated class risks,' and the 'commercial and extra-hazardous class', respectively; provided that such by-law be first approved by a majority of the members of such company present at the annual meeting referred to in article 161, or at a special meeting convened as directed by article 164."

Quebec Insurance Act, art. 174 (*R. S. Q. art.* 5292).

Art. 174. "The directors of any company, who have so separated their business into two classes, shall cause to be pre-

pared a schedule of the risks which may be insured in each class, and a tariff of rates for the same.

"They shall cause the accounts in each class to be kept separate and distinct the one from the other, and make any other regulations they may think necessary to keep the affairs of the two classes separate; and members of any such company insuring in one class shall not be liable for any claims on the other."

Quebec Insurance Act, art. 175, (*R. S. Q., art.* 5293):

Art. 175. "All necessary expenses, incurred in the conducting and management of such company, shall be assessed upon and divided between the two classes, in such proportion as the directors may determine."

These articles are substantially a reproduction of R. S. Q. arts. 5291, 5292 and 5293.

Other Provinces.

Similar powers are conferred in Ontario by R. S. O. 1897, c. 203, ss. 17, 18 & 19; in Manitoba by R. S. M. c. 85, ss. 62, 63, 64 & 65; in Alberta and Saskatchewan, by Con. Ord. N. W. T. c. 120, ss. 68, 69 & 70, and in Nova Scotia, by 3 & 4, Ed. VII, c. 46, ss. 29, 58, 59, 60, 61, 73.

CASH PREMIUM INSURANCE.

Quebec Insurance Act, art. 176 (*R. S. Q. art.* 5294).

"Any mutual fire insurance company may effect any insurance upon the cash premium principle, for a period not exceeding three years, on farm and other non-hasardous property, and for one year or less on any other class of property, on complying with the provisions of article 23 of this act."

This article reproduces R. S. Q. art. 5294, and is discussed, infra, p. 542.

The Quebec Insurance Act, art. 23 reads as follows:

"23. 1. No mutual fire insurance company shall effect in-

surance on the cash premium system, the cash system or fixed premium system, except on the following conditions:

"a. A by-law to that effect shall be adopted and approved by the majority of the members present at a meeting called in the manner prescribed by article 173.

"b. The sum specified in article 92 shall be deposited in the Treasury Department for the security of the insured.

"c. The company shall have a capital stock in accordance with articles 29 and following, and its business shall be divided into two separate and distinct branches, one for the insured under the mutual system and the other for the insured under the non-mutual or cash system. No person insured under the non-mutual or cash system shall in any wise be a member of the company nor liable beyond the premium he is bound to pay, and no person insured under the mutual system shall be liable for losses incurred under the non-mutual or cash system.

"d. A license shall be obtained from the Provincial Treasurer authorizing the mutual insurance company to do business under the non-mutual or cash system.

"e. The company shall be registered in the office of the Provincial Treasurer in accordance with articles 106, 107 and 108.

"2. Nevertheless the company shall not be bound to comply with the requirements of sub-paragraph c of paragraph 1 of this article, and all its property and assets, including deposit notes and undertakings shall secure all the losses which may take place on account of cash premium insurance when the company shall have accumulated and shall maintain the reserve mentioned in paragraph one of article 34, and the company shall then, after having complied with the requirements of article 37, if it thinks proper, allow, each year, to the insured under the mutual system, the profits on all its operations."

This article, which deals with cash mutual insurance is substituted for arts. 5295, 5296 and 5297 of the Revised Statutes of Quebec.

Other Provinces.

A corresponding provision is contained in Ontario, R. S. O. 1897, c. 203, ss. 140 & 167; Manitoba, R. S. M. c. 85, s. 36; Alberta and Saskatchewan, Con. Ord. N. W. T. c. 120, s. 66; and British Columbia, 2 E. VII, c. 35, s. 58, Nova Scotia, 3 & 4 E. VII, c. 46, s. 83.

This class of insurance is discussed, infra, page 542.

MEMBERSHIP IN MUTUAL COMPANIES.

Quebec Insurance Act, art. 177, (*R. S. Q., art.* 5298):

"1. Every person who, at any time, becomes interested in any existing mutual fire insurance company in this Province, or in any such company incorporated under section II of this act, by insuring therein, shall be a member thereof during the time specified in his policy, and shall, during such time, be bound by the law governing the same; but he may, without the consent of the company, withdraw therefrom, upon the terms and conditions specified in article 183.

"2. If, however, the company does business on the fixed premium plan, no person insured under the non-mutual plan shall be interested therein except as provided by article 23 of this act."

This article contains the provisions of R. S. Q., art. 5298, with the important addition contained in ss. 2, and is discussed, infra, p. 554.

Other Provinces.

A corresponding provision in Ontario is contained in R. S. O. 1897, c. 203, s. 107.

Membership in the company is conferred upon the owners of property who become insured, in Manitoba, by R. S. M. c. 85, s. 7; in British Columbia, by 2 E. VII, c. 35, s. 11; in Alberta and Saskatchewan, by Con. Ord. N. W. T., c. 120, s. 29, and in Nova Scotia, by 3 and 4, E. VII, c. 46, s. 4.

DEPOSIT OF PREMIUM NOTE.

Quebec Insurance Act, art. 178, (*R. S. Q., art.* 5299):

"Every member of any mutual insurance company shall, before he receives his policy, deposit his note or undertaking (hereinafter called a deposit note) payable on demand to the company only, endorsed to the satisfaction of the directors, and for a sum of money proportioned according to the classification of risks established by the directors.

"A part of said note, to such amount as the directors have by their by-laws determined, may be demanded and taken from such member, before he receives his policy, for the purpose of raising a fund to defray the incidental expenses of the company, and the remainder shall be payable, in whole or in part, at any time when the directors deem the same to be necessary for the payment of the losses or expenses of the company.

"In case the member is unable to write or sign his name, he may sign the deposit note or undertaking with his mark, in presence of a witness resident in the locality and who is not an agent of the company."

This article reproduces verbatim, R. S. Q., art. 5299.

Other Provinces.

A provision to the same effect in Ontario is contained in R. S. O. 1897, c. 203, s. 129; in Manitoba, in R. S. M. c. 85, ss. 47, 48 and 49. Provisions for the making and assessment of premium notes are contained in the British Columbia Mutual Insurance Act, 2 E. VII, c. 35, ss. 48, 49 and 50; in Alberta and Saskatchewan, in Con. Ord. N. W. T. c. 120, ss. 53 to 56, both inclusive, and in Nova Scotia, in 3 and 4, E. VII, c. 46, s. 39 *et seq.*

FORM OF PREMIUM NOTE.

Quebec Insurance Act, art. 179:

"1. Every deposit note or other undertaking must be completely detached from any other form or any other writing what-

ever, and the words "deposit note or undertaking", shall be printed in conspicuous type at the head of such deposit note.

"Every note or undertaking signed in contravention of this article shall be *de jure* null and void.

"2. Forms H., I. and J. to this act, or any forms to the same effect, shall be sufficient for the purposes for which they are intended."

This article, which is somewhat to the same effect as s. 127, ss. 2 of the Ontario Insurance Act, R. S. O. 1897, c. 203, there being no corresponding articles in the Revised Statutes of Quebec, has two objects in contemplation, first to prevent the note from being mistaken for an ordinary promissory note, and secondly, to prevent the parties from making any contract or agreement which would vary or add to the obligation created by the note itself. In Ontario these premium deposit notes sometimes contain a clause such as the following: "In case this note is not paid at maturity, the policy to be issued to me will become void, although the holder of the note may proceed to collect the same." (5)

It has been held in Quebec that it may be stipulated in the policy that the amount of the premium note given to a mutual insurance company shall, in case of loss, be deducted from the amount payable under the policy. (6)

ASSESSMENT IN ADVANCE.

Quebec Insurance Act, art. 180 (*R. S. Q., art.* 5300):

"The directors of the company may, by by-law, declare in each year, in advance, the amount of assessment on the deposit notes required to be paid in to meet the estimated annual losses and expenses, upon an estimate of the probable losses and expenses during the year, to be published in the manner to be provided by such by-law."

(5) Vide Dominion Grange *vs* Bradt, 25 Can. S. C. R., 158.

(6) Charette *vs* La Compagnie Mutuelle de Montmagny, Q. R., 16 S. C., 116.

This article is a reproduction of R. S. Q., art. 5300

It is the usual custom of mutual companies to make an annual assessment of an amount which is contemplated will be sufficient to meet the losses for the year, instead of making a special assessment in respect to each loss. The general powers conferred upon the companies with respect to assessments are wide enough to permit of this being done.

In Ontario these provisions are contained in R. S. O. 1897, c. 203, s. 130; in Manitoba, in R. S. M., c. 85, s. 48; in British Columbia, in 2 E. VII., c. 35, ss. 50 and 55; in Alberta and Saskatchewan in Con. Ord. N. W. T., c. 120, ss. 55 and 56; and in Nova Scotia, 3 and 4 E. VII., c. 46, s. 47.

TITLE. — INCUMBRANCES.

R. S. Q. Art. 5303:

It has been pointed out, supra, p. 506, that it was originally a characteristic feature of mutual insurance that the real or immoveable property of the insured should become hypothecated to the company as security for the payment of its losses, and that this feature in Ontario was expressly done away with in 1873, by 36 Vict., c. 44, whereas it was retained in Quebec. It was also pointed out that owing to the fact that the real property of the members became the capital upon which the company could fall back in case of necessity for the payment of losses, the earlier legislation expressly provided that any act of the insured by which his title to the real property became lessened in value or incumbered, should void his policy. A provision of this sort is contained in the Revised Statutes of Quebec, 1888, which reads as follows:

Art. 5303. "Any such company may insure, by the same policy and at one time, for any term not exceeding five years, and any policy of insurance issued by the company, signed by the president, and countersigned by the secretary, shall be valid and binding on the company, in all cases where the insured has, at the time the damage occurs, the title or estate, described by him

at the time of effecting the insurance, to the land on which any property damaged by fire is situate.

"If the insured have a less title or estate in such property, or if the same be encumbered otherwise than described as aforesaid, the policy shall be void."

This article is dropped in the Quebec Insurance Act, 8 E. VII., c. 69, although the correlative article 5322, by which the insured's immoveable property is hypothecated, is retained in art. 192. Apparently in the new legislation, it was thought that the provision in the statutory condition 3, which by the Act was made applicable to all contracts of insurance in that province, and which provided that the policy should be void by reason of any change in the use or condition of the property, was a sufficient protection to the company, without any express reference to change of title. The result, however, is that whereas under the old Act the policy became void *ipso facto* where the insured had incumbered or lessened his estate in the insured property at the time of the loss from what it was at the date of the insurance, under the new Act such a change in the title will not have that effect unless it increases the risk; the laws in this respect under the new Act being made the same as in the Province of Ontario.

Manitoba and Nova Scotia.

In Manitoba, where there is a similar statutory condition, the Mutual Companies Act, by s. 42 of R. S. M., c. 85, provides as follows:

"42. All policies of insurance issued by the board of directors, sealed with the seal of the company, signed by the president or vice-president, and countersigned by the secretary or acting secretary, shall be binding on the company:

"Provided that any misrepresentation contained in the application therefor, or any false statement respecting the title or ownership of the applicant or his circumstances, or the concealment of any incumbrance on the insured property or on the land

on which it may be situate, or the failure to notify the company of any change in the title or ownership of the insured property and to obtain the written consent of the company thereto, shall render the policy void, and no claim for loss shall be recoverable thereunder, unless the board of directors in their discretion shall see fit to waive the defect." A similar provision is contained in the Nova Scotia Act, 3 and 4 Ed. VII., c. 46, s. 34.

In these provinces, therefore, misrepresentations as to title or ownership or a failure to notify the company of any incumbrance or change in title, voids the policy whether material or not. As pointed out, supra, p. 507, in the Province of Nova Scotia the decisions with respect to misrepresentations and change of title in Ontario prior to 1873 and the Quebec cases under corresponding sections of its insurance acts are now applicable to the Province of Nova Scotia.

In British Columbia, Alberta and Saskatchewan, a change in title, or the placing of an incumbrance upon the insured property is covered solely by the third statutory condition, and only voids the policy when material.

In a case falling under art. 5303 it was held that:

"L'intimée, en se disant propriétaire de l'immeuble qu'elle faisait assurer, bien qu'elle n'en jouissait qu'à titre de grevée de substitution, n'a pas fait une fausse déclaration, et cette omission de sa part n'est pas une cause suffisante pour l'appelante de demander l'annulation du contrat d'assurance qu'elle a passé avec l'intimé. (7)

In the following case the Court said:

"La loi des compagnies d'assurance mutuelle est une loi d'ordre public. Les membres de ces associations sont presque toujours des cultivateurs qui n'ont pas beaucoup d'expérience des affaires et la loi a pour but de les protéger; il me semble que les clauses du statut ci-haut cité doivent être strictement interprétées; que le but de la législature était d'exempter les parties

(7) Assurance Mutuelle de Montréal *vs* Villeneuve, 4 D. C. A., 376; M. L. R. 2 Q. B. 89; 29 J. 163; 9 L. N. 146.

de la procédure légale, et elle prescrivait qu'avant de poursuivre en loi, une certaine procédure doit être suivie afin de régler les réclamations, sans recourir à la cour, et il me semble que dans cette cause, la preuve démontre que cette procédure aurait dû être suivie, et ne l'a pas été.

" Je suis d'opinion que l'action des demandeurs ne peut être maintenue pour ce motif...

" Dans ce cas, les assurés n'avaient qu'une promesse de vente du terrain sur lequel le moulin et les machines assurés étaient situés, et pour une partie des machines ils n'avaient pas un titre absolu, c'était une vente qui avait été faite aux demandeurs par les manufacturiers, et le montant de la vente n'ayant pas été complètement payé, les vendeurs avaient réservé la propriété des choses vendues jusqu'à parfait paiement.

" On sait qu'une police d'assurance mutuelle porte hypothèque sur la propriété immobilière de l'assuré, et que, dans ce cas, cette police aurait dû porter hypothèque sur la propriété sur laquelle les effets assurés étaient situés, mais cette propriété n'appartenant aux demandeurs que par un titre de promesse de vente, cette hypothèque n'était qu'éventuelle et conditionnelle." (8)

A property was insured for five years, the assured believing himself to be the sole owner. He afterwards discovered that half of it belonged to the heirs of his deceased wife. It was held, that this mistake as to the ownership made the policy void, and it would not bind the company in case of loss. (9)

In a contract of mutual fire insurance, where the application forms part of the contract, representations in the application as to the title of the insured are to be strictly interpreted, and the rules of ordinary fire insurance do not apply. So, where the insured stated in the application that he was owner of the immovable sought to be insured, whereas his father-in-law was the registered owner, his pretention that he was the real owner, and that his father-in-law was merely his agent in respect of the

(8) Ouellette *vs* Jacques Cartier, Q. R., 31 S. C., 29.
(9) Mutual Assurance Co. *vs* LeMay, Q. R., 12 S. C., 232.

property, could not avail, and the policy was absolutely null and void. (10)

P. transferred to appellant two insurance policies issued by respondent. Subsequently the property insured was destroyed by fire, but after P. had ceased to have any interest in such property. On a claim by appellant to recover the amount of such policies, it was held, that the assignee of a policy issued by a mutual insurance company can only exercise such claims as the transferror himself could have done, and that in the case in point, P. having ceased to have any title to the property insured under the policies aforesaid, and that the appellent was therefore debarred from such claim. (11)

Art. 2471 C. C. "Mutual insurance is not commercial. It is governed by special statutes, and by the general rules contained in this title, in so far as they are applicable and not inconsistent with such statutes."

Though policies issued by a mutual company are civil and not commercial contracts, the companies may engage in commercial matters. Though the charter of a mutual insurance company declared that only policy-holders participating in profits were members, if the company engages in acts of commerce by issuing ordinary policies, it will be entitled in an action to which it is a party, to trial by jury. (12)

SUBJECT MATTER OF INSURANCE.

Quebec Insurance Act, art. 181 (*R. S. Q., art.* 5304):

"Within the limits specified in its license, and in accordance with art. 201, the company may insure dwelling-houses, stores, shops and other buildings, household furniture, merchandise,

(10) Lambert *vs* La Foncière Compagnie d'Assurance, Q. R., 25, S. C., 169.

(11) Willey *vs* Mutual Fire Ins. Co. of Stanstead, 2 Dorion, Q. B. R., 29.

(12) British Empire Mutual Life Ass. Co. *vs* Bergevin, Q. R., 5 Q. B., 55.

machinery, live-stock, farm produce, and other commodities, against damage or loss by fire or lightning, whether the same happens by accident or any other means except design on the part of the insured, foreign invasion or insurrection."

This article is the same as R. S. Q., art. 5304.

A provision applicable to all insurance companies in Ontario is contained in R. S. O., 1897, c. 203, s. 166, supra p. 68.

A similar provision, with some verbal variations is found in R. S. M., c. 85, s. 34; in Con. Ord. N. W. T., c. 120, s. 44; in British Columbia, 2 Ed. VII., c. 35, s. 45, and in Nova Scotia, 3 and 4 Ed. VII., c. 46, s. 32 as amended by 7 Ed. VII., c. 45.

PROPERTY NOT INSURED.

R. S. Q., art. 5306:

"No allowance shall be made to any member for account-books, papers, money or jewels, destroyed or damaged by fire."

This article is not reproduced in the Quebec Insurance Act, 8 Ed. VII., c. 69, as a much more elaborate provision is contained in the statutory conditions, numbers 6 and 7, and uninsured property is expressly excepted from the policy by the statutory conditions wherever in force in the other provinces.

In Nova Scotia, the property insured will depend upon the description in the policy and the special conditions attached thereto, subject always to the provisions of s. 31.

ALIENATION BY SALE OR MORTGAGE.

R. S. Q., 5307:

"When any property insured is alienated by sale or otherwise, the policy thereon shall be void, and shall be surrendered to the directors to be cancelled, and upon such surrender, the member making it shall receive the note deposited at the time the policy was issued, upon paying his portion of all losses and expenses that have previously occurred.

"The grantee or alienee, having the policy assigned to him, may have the same confirmed to him, for his proper use and benefit, upon the application to the directors, and with their consent, within thirty days after such alienation, on signing an obligation accepting of the transfer and assuming the obligations of the alienor; and by such ratification such alienee shall become entitled to all the rights and privileges and subject to all the liabilities to which the alienor was subject."

Art. 5307 is not reproduced in the Quebec Insurance Act, 8 Ed. VII., c. 69.

Art. 5307 has come down through the various consolidations, from 4 Wm. IV., c. 33, s. 21; and a similar section in Upper Canada was contained in 6 Wm. IV., c. 18, s. 19.

Quebec Insurance Act, art. 182 (*R. S. Q., art.* 5308):

"Where the assignee of the policy is the holder of a hypothecary claim against the property insured, the directors may permit the policy to remain in force and to be transferred to him by way of additional security, without requiring any note or undertaking from such assignee or his becoming in any manner personally liable for assessments or otherwise; but, in such cases, the deposit note or undertaking and liability of the vendor or assignor in respect thereof, shall be in nowise affected."

This article reproduces R. S. Q., art. 5308 in part.

The provisions of art. 5308, however, were not introduced until 1882, by 45 Vict., c. 51, s. 35, and a corresponding provision in Ontario was introduced by 36 Vict., c. 44, s. 39.

It has been pointed out, supra p. 504, that the Ontario section which included the provisions of the Quebec articles 5307 and 5308, was dropped in the Consolidation of 1887, 50 Vict., c. 26, and now, in Quebec, the portion which relates to alienation by sale contained in art. 5307, disappears in the Quebec Insurance Act, but art. 5308, which deals with the rights of the assignee of the policy who is a mortgage creditor, is retained.

In Manitoba, R. S. M., c. 85, s. 45, with a variation about to

be discussed, is the same as arts. 5307 and 5308 of the Revised Statutes of Quebec, and R. S. O., 1877, c. 161, s. 41. This variation is, that, the portion of the original clause which declared the policy void by reason of alienation by sale, etc., is struck out, and the section simply provides what the company may do where it is entitled to avoid the policy for alienation. The draftsmen of the Manitoba Act evidently being of the opinion that the provision in the Ontario Act for avoiding the policy was no longer necessary to be retained in view of the 4th statutory condition which provided, as it does in the statutory conditions of all the provinces, that if the property insured is assigned without written permission of the company, the policy should be void.

The draftsmen, however, considered apparently that it was desirable to retain, which was not done in the Ontario Consolidation, the provisions with respect to the rights of an assignee of a policy who was also a mortgage creditor.

Similarly in Alberta and Saskatchewan, apparently following the Manitoba Act, by Con. Ord. N. W. T., c. 120, s. 51, the provisions of s. 45 of the Manitoba Act are reproduced.

The British Columbia Mutual Insurance Act contains no similar provision.

In Nova Scotia, however, these sections are reproduced in s. 37.

The reasons for dropping the old alienation clauses in some of the provinces and retaining them in others, so far as the assignee of a mortgage is concerned, are not quite clear.

In Ontario it was held that the fourth statutory condition did not apply to an alienation by way of mortgage, but only to an absolute transfer of property. (13)

It had previously been held by Sir John B. Robinson, (14) that the word "alienation" in the original Mutual Insurance Companies Act, 6 Wm. IV., c. 18, s. 19, which is the same as

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(13) Sands *vs* Standard Ins. Co., 26 Gr., 113, 27 Gr., 167, supra p. 405; affirmed in Bull *vs* North British Canadian Investment Co., 15 A. R., 421, 1 S. C. Cas., 1.

(14) Burton *vs* Gore District Mutual Ins. Co., 14 U. C. R., 342, supra p. 407.

art. 5307 above, referred only to alienations which left no interest remaining in the person originally insured.

When the Mutual Insurance Companies Acts were consolidated in Ontario in 1873, by 36 Vict., c. 44, the provision of s. 19 of the old Mutual Companies Act was amended by adding the clause respecting a mortgagee which is substantially the same as the provision in art. 5308, and when the courts were called upon to construe the meaning of "alienation" in view of this addition to the original section of the Mutual Act, it was held (15) that so far as Mutual Insurance Companies were concerned, the alienation which voided the policy included alienation by way of mortgage.

In Nova Scotia where the statute law is the same as it was in Ontario by 36 Vict., c. 44, the same rule of law still prevails.

It would appear, therefore, that as respects all other insurance companies except mutual companies, a mortgage is not an alienation which voids the policy under statutory condition no. 4; that as respects mutual companies, since the repeal in Ontario of the provisions of 36 Vict., c. 44, s. 39, which is the same substantially as arts. 5307, and 5308 R. S. Q., supra, the law is the same as has been held to apply to non mutual companies. The repeal of the Quebec Insurance Act of art. 5307 R. S. Q. would appear to make the law in that province now the same as in the Province of Ontario, and the fourth statutory condition does not apply to hypothecation of immoveable property.

In the provinces of Manitoba, Alberta and Saskatchewan, had the sections of the Mutual Act (16) reproduced the provisions of the old Ontario Act, so that the clause was introduced by a provision voiding the policy for alienation, it would be clear that the decision in Kanady *vs* Gore District Mutual would apply, and that in these provinces, so far as mutual insurance companies are concerned, alienation by mortgage would void the policy.

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(15) Kanady *vs* Gore District Mutual Ins. Co., 44 U. C. R., 261.

(16) R. S. M., c. 85, s. 45; Con. Ord. N. W. T., c. 120, s. 51.

But the Legislature of Manitoba having altered in this respect the corresponding provision in the old Ontario Act, it would appear that the alienation there referred to can only be the alienation provided for in statutory condition no. 4, and which, by the well settled jurisprudence in Ontario above mentioned, only applies to the absolute alienation of the insured property, and not to alienation by way of mortgage.

In the result, therefore, in all the provinces of Canada in which the statutory conditions are in force, except Nova Scotia, whether we have to deal with mutual or non-mutual insurance companies, the fourth statutory condition must be taken not to refer to alienation by way of mortgage. In Nova Scotia, when the policies are issued by stock companies, "alienation" does not include alienation by mortgage but in policies of Mutual Companies it does. In the other provinces of Canada, the interpretation to be placed upon the word "alienation" must depend upon the express language of the condition in the policy, and where the language of the condition is the same as that of the fourth statutory condition, or to a similar effect, and is not followed by a provision with respect to the assignee of the policy who is a mortgage creditor, the condition must in the same way be constructed as having reference solely to an absolute alienation of the insured property.

CHANGE MATERIAL TO THE RISK.—DOUBLE INSURANCE.

R. S. Q., art. 5309:

"Whenever a building or any furniture, insured by the company, shall have become exposed to a greater risk than that which existed when the insurance was effected, and this happens through the act of the proprietor, his tenants or neighbours, and no notice of it has been given to the board and no new agreement made with the company, the policy shall become void.

"A condition to this effect shall be endorsed on each policy."

R. S. Q., art. 5310:

"When ever notification in writing has been received by a company from an applicant for insurance, or from a person already

insured, of his intention to insure, or of his having insured, an additional sum on the same property in some other company, the said additional insurance shall be deemed to be assented to, unless the company so notified shall signify to the party, in writing, its dissent.

"In case of dissent, the liability of the insured on the deposit note or undertaking shall cease from the date of such dissent, on account of any loss that may occur to such company thereafter, and the policy of the assured shall be void, at the option of the directors of the company."

R. S. Q., art 5309 is repealed by the Quebec Insurance Act, 8 E. VII., c. 69, as the provision is now replaced by the third statutory condition.

Art. 5310 is also repealed, as a corresponding provision is contained in statutory condition No. 8.

The Consolidated Statutes of Lower Canada, c. 68, s. 30, voided the policy for double insurance. When the Mutual Insurance Companies Acts of Quebec were consolidated in 1882, 45, V. c. 51, this section of the Consolidated Statutes was dropped, and two clauses were added, ss. 36 and 37, which subsequently appeared as arts. 5309 and 5310. The result of this change in the law was to make double insurance only a cause of forfeiture when it fell within the provisions of art. 5309; in other words, when the double insurance had the effect of exposing the company to greater risks.

Other Provinces.

In the provinces in which the statutory conditions are made applicable to mutual insurance companies, and there is no express provision in the Mutual Insurance Act altering or extending the same, double insurance and changes material to the risk are governed by the statutory conditions. In Nova Scotia, however, these matters are governed by 3 and 4 E. VII., c. 46, ss. 35, 36 and 38, and in Manitoba, as is pointed out infra, p. 515, a change in title or ownership will void the policy, notwithstanding that the 3rd statutory condition in force in that province only extends to changes which are material to the risk.

R. S. Q., art. 5311:

"The provisions of the three preceding articles shall be held to include and have reference to all property, as well personal as real, which companies are allowed to insure."

This article is also repealed by the Quebec Insurance Act, 8 E. VII., c. 69.

The Mutual Insurance Companies Act, 1882. 45 V. c. 51, provided by s. 38, that the provisions which are reproduced in arts. 5309 and 5310 should apply to personal as well as real property.

This article first appears in 19 and 20 V. c. 58, s. 1, and was introduced to meet a decision of the Quebec courts (17) where it was held that 4 Wm. IV., c. 33, s. 23, which voids the policy for double insurance only applied to houses or buildings and not to goods.

Previous to the Consolidation of 1882 it was also held that the statutory requirement applicable to insurance in mutual insurance companies that the consent of the directors to a double insurance must be signified by an indorsement on the policy, or other acknowledgement in writing, is not satisfied by evidence of mere knowledge by the insurers of other insurance. (18)

It was held that a policy of insurance issued by a Mutual Fire Insurance Company will be held void under C. S. L. C., c. 68, s. 30, if a second insurance has been taken upon the same property for the benefit of a mortgage creditor (of which the premiums are paid by the owner) without notice to company issuing first policy. (19)

After the Consolidation 45 V., c. 51, it was held that a policy, to which that Act applied, would not be voided because the insured hypothecated the immoveable upon which the insured buildings were built, and the hypothecary creditor, with the consent of the owner of the buildings, insured them in another insurance company without notifying the mutual company, when the mu-

(17) Chalmers *vs* Mutual Fire Ins. Co. of Stanstead, 3 L. C. J., 2.
(18) Dustin *vs* Hochelaga Mutual Fire Ins. Co., 4 L. N., 295.
(19) Blais *vs* Stanstead Mutual Fire Ins. Co., 15 R. L., 60.

tual company does not prove that its by-laws prohibited the mortgaging of property insured by it, or the placing of double insurance thereon without previous notice to it. (20)

OPTION TO ALLOW VOID CLAIMS.

R. S. Q., art. 5312.

"It shall be optional with the directors to allow claims, which are void under articles 5303, 5307, 5308 and 5309."

This article is repealed by the Quebec Insurance Act, 8 E. VII., c .69, but mutual companies, nevertheless, without any express statutory provision, would have power to pay claims which are only voidable and not void, by reason of some breach of a condition of the policy or of the statute. This subject has been discussed under the head of "Void and Voidable", supra, p. 138.

CANCELLATION OF POLICY.

Quebec Insurance Act, art. 183, (*R. S. Q., art.* 5313):

"1. The company, or the secretary if the company has given him a general or special authority for that purpose, may cancel any policy, in accordance with the conditions thereof, by giving to the insured notice in writing to that effect, signed by the secretary and transmitted to the insured by registered letter.

"2. The person insured shall nevertheless be liable to pay his proportion of the losses and expenses to the company up to the time of such cancellation, and, on so doing, he shall be entitled to a return of his deposit note.

"3. Paragraph 2 of this article shall, as against the insured, be deemed to form part of the contract, and no provision to the contrary or providing for any change, addition or omission, shall bind the insured in any way.

"4. Nevertheless, should a loss occur on the property insured by the company, the board of directors may retain the amount of

(20) Cie d'Assurance Mutuelle de Richmond *vs* Fee, 16 R. L., 461.

the deposit note or undertaking given for the insurance of such property, until the expiration of the term for which the insurance was contracted, and at the expiration of such term, the insured may withdraw such part of the amount retained as has not been assessed.

"5. When a policy has expired and all the assessments from the previous 31st December to the day of the expiration of the policy have been levied, the deposit note or undertaking is null and void and must be delivered to the signer thereof on his application therefor, if all the assessments above mentioned have been paid."

Subsections 1 and 2 of this article reproduce substantially art. 5313 R. S. Q.

DEPOSIT NOTE TO BE RETURNED.

Quebec Insurance Act, art. 184, (*R. S. Q., art.* 5314).

"When a policy has expired or has been annulled by the board or by the secretary for any reason whatever, and when the insured has paid his dues to the company, his deposit note shall be returned to him; but in no case shall such a policy-holder have the right to ask or claim any share in the reserve fund except where the company winds up its affairs during the five years from the expiration or cancellation of the policy; the holder of an expired or cancelled policy then has the right, as against the other policy holders, to claim his proportionate share of the reserve fund."

The first part of this article reproduces the whole of art. 5314 R. S. Q.

The effect of subsequent assessment of a premium or deposit note after the policy has become voidable by reason of non-payment of prior assessments, has been considered in the chapter on Waiver and Estoppel at p. 161 supra.

Statutory condition No. 19 provides for the method by which a policy may be cancelled where the insurance is on the cash principle. These articles provide for the cancellation by mutual

companies. A less elaborate provision is made in the Ontario Insurance Act, by R. S. O. 1897, c. 203, ss. 111 and 137; in Manitoba, by R. S. M. c. 85, s. 44; in Alberta and Saskatchewan, by Cons. Ord. N. W. T. c. 120, s. 50, in British Columbia, by 2 E. VII., c. 35, s. 51, and in Nova Scotia, by 3 and 4, Ed. VII., c. 46, s. 24.

The defendants claimed the right, under R. S. O., 1887, c. 167, s. 131, to retain the amount of the premium note given by the mortgagor until the time had expired for which the insurance was made to cover any assessments that might be made thereon: Held, that, as against the mortgagee, they were not entitled to retain the amount. (21)

ASSESSMENTS AND COLLECTION THEREOF.

Quebec Insurance Act, art. 185, (*R. S. Q., art.* 5315):

"Every member of the company shall pay his proportion of all losses and expenses incurred, and the deposit notes or undertakings, belonging to the company, shall be assessed under the direction of the board of directors, at such intervals from their respective dates, for such sum as the directors determine, and for such further sums as they may think necessary to meet the losses and other expenditure incurred during the currency of the policies for which the said notes or undertakings were given, and in respect to which they are liable to assessment.

"Every member of the company or person who has given his deposit note shall pay such sums, from time to time, during the continuance of the policy in accordance with such assessment."

Quebec Insurance Act, art. 186, (*R. S. Q., art.* 5316):

"Whenever any loss or damage by fire, sustained by any member, is ascertained and is payable by any such company, the directors shall settle and determine the sums to be paid by the several members as their respective portion of such loss, and publish the same in such manner as shall be provided by the by-laws of the company.

(21) Anderson *vs* Saugeen Mutual Fire Ins. Co., 18 O. R., 355.

"The sum to be paid by each member shall always be in proportion to the original amount of his deposit note, and shall be paid to the treasurer within thirty days next after the publication of such notice.

"If any member, during thirty days after such notice, fail, neglect or refuse to pay such sum as determined by the directors, the directors may sue for and recover from such member the amount of his deposit note and costs of suit, and the amount recovered shall remain in the hands of the treasurer of the company, subject to the payment of the portion of all losses and expenses to which such member shall be liable; and the balance, if any, shall be returned to such member at the expiration of the term of his policy."

Quebec Insurance Act, art. 187, (*R. S. Q., art.* 5317):

"Whenever any loss or damage by fire, sustained by any member of the company, is ascertained, and payable by the company, the directors may cause the same to be settled and paid conformably to this section and the regulations of the company, and may cause to be entered in the books of the company the amount of the assessment to be paid by each member of the said company, on the amount of his deposit notes."

These articles reproduce arts. 5315, 5316 and 5317 respectively of the Revised Statutes of Quebec.

Corresponding provisions are contained in Ontario, in R. S. O. 1897, c. 203, ss. 130, 133 and 134; in Manitoba, R. S. M. c. 85, ss. 48 and 52; in Alberta and Saskatchewan, Cons. Ord. N. W. T. c. 120, ss. 56 and 60; in British Columbia, 2 E. VII., c. 35, ss. 48, 50 and 51, and in Nova Scotia, 3 and 4, Ed. VII., c. 46, s. 39 *et seq.*

A mutual insurance company incorporated under c. 68, C. S. L. C., is not an ordinary partnership. The members' liability is determined and limited by s. 12 (now art. 5315), (22) of the said Act, and the directors cannot involve them in a greater liability than that provided by the Act. (23)

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(22) Art. 6451 in the Report upon the New Revision.

(23) Banque Molson *vs* Cie d'Assurance Mutuelle de Joliette, 13 R. L., 392.

These articles and sections provide for the collection of an assessment after each loss. The next three following articles contemplate one annual assessment to cover losses and expenses of the company for the year, and provide for the collection of such assessments.

ONE ANNUAL ASSESSMENT.

Quebec Insurance Act, art. 188, (*R. S. Q., art.* 5318):

"In order that there may be but one assessment annually, and that it be imposed at the annual meeting of the company, the directors are hereby authorized, in case of any loss or damage by fire, or to cover incidental expenses, to borrow such sums of money as the circumstances may render necessary, but the amount which the directors may borrow is limited to one-fifth of the amount of their unassessed deposit notes.

"The interest payable on such loans, as well as the capital thereof, if not previously provided for, may be included in the annual assessment, which however, shall be imposed, as nearly as may be practicable, on the deposit notes in force at the time of such loss and of the loan effected to repay the same."

Quebec Insurance Act, art. 189, (*R. S. Q., art.* 5319):

"The directors shall cause a notice of the total amount of assessments on deposit notes to be paid in any year, to be published in the form provided by the by-laws of the company, in at least one newspaper published within the district where the property insured is situated if there be such newspaper published within the district, and if not, the same shall be published in a newspaper published nearest to the district in which the said property is situated, or by a circular mailed to each member."

"It shall be lawful for the company to dispense with publishing the rate of assessments in a newspaper, provided a notice of such assessments is sent to each member of the company by mail."

These articles reproduce R. S. Q., arts. 5318 and 5319 respectively.

It is to be noted that arts. 188 and 189 differ from the corresponding articles in the Revised Statutes, 5318 and 5319, in providing first, that the amount which the directors may borrow is limited to one fifth of the amount of their unassessed deposit notes, and in providing also that in lieu of publishing the rate of assessment in a newspaper, a notice of the assessment may be sent to each member of the company by mail.

In the other provinces there is no express provision corresponding to articles 188, 189 of the Province of Quebec, but the general provisions of the acts providing for assessments are sufficiently broad to cover such annual assessment.

ACTIONS FOR ASSESSMENTS.

Quebec Insurance Act, art. 190. (*R. S. Q., art.* 5320):

"Thirty days after such notice, the directors may sue for and recover, with costs, the assessments on the deposit notes of the members who have refused or neglected, during such time, to pay to the treasurer of the company the sum of money which the directors have declared to be payable on such deposit note.

"In all suits for the recovery of the said assessments, the certificate of the secretary-treasurer of the company shall be *primâ facie* evidence that the same are due and that all formalities have been complied with."

This article is a reproduction of R. S. Q., art. 5320.

It is also to be noted that art 190, which provides for the certificate of the secretary-treasurer being *prima facie* evidence of an assessment, apparently only applies to the annual assessment, and there is no corresponding provision where the action is brought under art. 5316.

In the other provinces (24) the certificate is made *prima facie* evidence generally.

The provision for bringing suit upon overdue assessments 30

(24) R. S. O. 1897, c. 203, s. 135; R. S. M., c. 85, s. 53; Cons. Ord. N. W. T., c. 120, s. 61; B. C. 2 E. VII., c. 35, s. 52; N. S. 3 & 4 Ed. VII., c. 46, s. 46.

days after notice, which is covered by arts. 183 and 190, is contained in Ontario R. S. O., 1897, c. 203, s. 134; in Manitoba, R. S. M., c. 85, s. 52; in Alberta and Saskatchewan, Cons. Ord. N. W. T., c. 120, s. 60; in Nova Scotia, 3 and 4 Ed. VII., c. 46, s. 45, while in British Columbia there is no express provision similar to that contained in the other provinces authorizing the action to be brought for overdue assessments. 2 Ed. VII., c. 35, s. 50, simply provides that assessments shall become due and payable 30 days after notice thereof has been mailed and that failure to pay the assessment may void the policy at the option of the directors.

FORM OF ASSESSMENT NOTICE.

In Quebec and British Columbia there is no article which makes provision respecting the requisites of a notice of assessment, but in the other provinces this is expressly provided for. In Ontario R. S. O., c. 203, s. 132 provides as follows:

"132. A notice of assessment upon any premium note or undertaking mailed as aforesaid shall be deemed sufficient if it embodied the register number of the contract, the period over which the assessment extends, the amount of the assessment, the time when and the place where payable."

A similar provision is contained in Manitoba, R. S. M., c. 85, s. 50; Alberta and Saskatchewan, Cons. Ord. N. W. T., c. 120, s. 58; and in Nova Scotia by 3 and 4 Ed. VII., c. 46, s. 43.

That assessment was necessary must be proved.

In actions by the company for an assessment, it is bound to prove that the assessment was necessitated by losses actually incurred by the company since the signing of the premium note by the insured, and that the assessment was made in proportion to the said note. (25)

Members of a Mutual Insurance company are only liable for

(25) Compagnie d'Assurance Mutuelle *vs* Proteau, 6 L. N., 85.

losses during the period that their policies remain in force, and the assessment should show that the losses have been incurred during the period in which the policy was in force. (26)

In an action for calls under a mutual insurance policy it is necessary to allege and prove the losses for which the calls are made. (27)

The liquidators of a mutual insurance company in suing members on assessments must prove the losses, the debts and expenses which rendered it necessary, and must in every respect conform to the notices. (28)

The cancellation of a policy by a Mutual Insurance Company is a sufficient ground to defeat an action brought against the policy holder for a call made one month after the cancellation if there is no proof that the call is made to meet losses anterior to the cancelling. (29)

It is not competent to a person insured in a Mutual Insurance company, when called upon to pay assessments on his premium note, to compel the company to enter into a detailed statement of the losses in order to establish the correctness of the assessments made by the directors. The latter in making the assessments are the agents of the insured, who in the absence of fraud is *quoad* such assessments, bound by their acts and by the terms of the premium note. (30)

EXTENT OF ASSESSMENT.

It was held, that an assessment for the purpose of paying promissory notes given by a mutual insurance company must be confined to the premium notes or undertakings current at the time the loss occurred in respect of or to meet which the company's notes were given. New members cannot be assessed to pay notes given previously to their joining the company.

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(26) Banque Molson *vs* Compagnie d'Assurance Mutuelle de Joliette, 13 R. L., 392.

(27) Mutual Fire Ins. Co. of Joliette *vs* Dupuis, 28 L. C. J., 179.

(28) Assurance Mutuelle de Joliette *vs* Bourgoin, 10 Q. L. R., 110.

(29) Hochelaga Mutual Ins. Co. *vs* Girouard et al., 7 Q. L. R., 348.

(30) Giles *vs* Brock, 5 L. N., 369.

The directors of the plaintiff company assessed the defendant, a policy-holder, for several sums, one of which was illegal, and they sent one notice to him, claiming the amount of all the assessments, including the illegal one, in one sum:—Held, reversing 32 U. C. C. P., 476, that the plaintiffs were not entitled to recover any of the assessments. (31)

An insurer with a mutual insurance company is not liable for assessment made before his insurance was effected, or premium note given. At the trial the learned judge so ruled, and refused to allow defendants to plead a subsequent assessment made after the policy. The court would not grant a new trial on the ground of such refusal, no affidavit of such assessment being filed. (32)

PRESCRIPTION OF CLAIM FOR ASSESSMENT.

In matters of mutual insurance the call made on each of the insured to make up losses incurred by a fire, is not subject to the prescription of five years. (33)

ATTACHMENT OF ASSESSMENTS.

In the absence of fraud, negligence of mal-administration, it is not competent to a judgment creditor of a Mutual Fire Ins. Co. of the Province of Quebec to attach monies payable to the company by way of assessments under the provisions of the Liquidation Statute, 28 V., c. 13. (34)

ACTION FOR ASSESSMENTS.

In actions by plaintiffs, a mutual insurance company incorporated by special Act, 32 and 33 V., c. 70 (D), against defen-

(31) Victoria Mutual Fire Ins. Co. of Canada *vs* Thompson, 9 A. R., 620.

(32) Green *vs* Beaver & Toronto Mutual Fire Ins. Co., 34 U. C. R., 78.

(33) Gilles *vs* Lalumière, 28 L. C. J., 287.

(34) Savoie *vs* Compagnie d'Assurance Mutuelle contre le Feu d'Hochelaga, 26 L. C. J., 166.

dants on their policies for the losses and liabilities on the winding up of the company under 40 V., c. 72 (D): Held, that defendants were not liable, as their insurances were effected in branches not authorized by the Act affecting the company, and were therefore invalid. Held also, that even if the insurances were valid, the liability would only be for the losses and liabilities in the particular branches in which the insurances were effected, and not for the general losses and liabilities of the company. (35)

NON-PAYMENT OF NOTE.

For an assessment made on the premium note, the insured, at the request of the company's secretary, gave a note at two months, signed by himself, and one L., which the secretary stated would be accepted as payment, and in the company's register the assessment was entered as paid by this note. The note was not paid at maturity, in consequence of which the company refused to pay the loss: Held, that under s. 44 of the Mutual Insurance Companies Act, 36 V., c. 44 (O), the note could only be deemed as suspending the debt during its currency, and therefore its non-payment at maturity avoided the insurance. (36)

Default of payment of one of the deferred payments of the first instalment of a premium note given by an insurer in a mutual fire insurance company, under s. 129 of the Act R. S. O., 1897, c. 203, does not *ipso facto* work a forfeiture. A note by the company to the insurer treating the payment as an assessment and notifying him that in the event of non-payment the policy would be suspended, is not an assessment under s. 130, and non-payment pursuant to the notice does not suspend the operation of the policy. (37)

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(35) Beaver & Toronto Mutual Fire Ins. Co. *vs* Spires, 30 U. C. C. P., 304. See also, Beaver & Toronto Mutual Fire Ins. Co. *vs* Champness, 30 U. C. C. P., 307; and Beaver & Toronto Mutual Fire Ins. Co. *vs* Bradford, 30 U. C. C. P., 307.

(36) McGugan *vs* Manufacturers & Merchants Mutual Fire Ins. Co., 29 U. C. C. P., 494.

(37) Woolley *vs* Victoria Mutual Fire Ins. Co., 26 A. R., 321.

NEGOTIABILITY OF NOTE.

Held, that a promissory note made in 1871, payable to the order of a mutual insurance company, or its officers, in respect of a policy, was negotiable. (38)

NON-PAYMENT OF ASSESSMENT AFTER ASSIGNMENT OF POLICY.

N. in September, 1872, effected an insurance for three years with the defendants, a mutual insurance company, acting through an agent, on two houses, which property N. had previously mortgaged to one G. by whom the application stated the policy was to be held as security, and was so entered in the books of the company, and he with N. attended at the agent's office, and joined in signing the premium note. The policy was issued on the 14th September, and the usual consent of the company to such assignment was indorsed thereon "subject to all the terms and conditions therein referred to", one of which was, that if any assessment to be made on the premium note should remain unpaid for a period of thirty days after notice thereof to the assured, the company would be at liberty to cancel the policy. On the 31st May, 1873, N. made an assignment in insolvency. On the 11th August, 1873, an assessment of $10.80 was made on the premium note, of which notice was given to N. only; no notice whatever having been sent to or served upon the representatives of G. who had died in the previous month of March. The property insured was destroyed by fire on the 25th March, 1875, the company having, on the 25th April previously, assumed to cancel the policy for non-payment of the assessment: Held, under the circumstances stated, that the company had not any power to cancel the policy; that the same was still a continuing security in favour of the estate of G., whose representative was entitled to recover from the company the amount secured by such policy. (39)

(38) McArthur *vs* Smith, 1 A. R., 276.
(39) Guggisberg *vs* Waterloo Mutual Fire Ins. Co., 24 Gr., 350.

NON PAYMENT OF ASSESSMENT VOIDS THE POLICY.

Quebec Insurance Act, art. 191 (*R. S. Q., art.* 5321) :

"Any member of such company who fails to pay his assessments within three months from the time they become due, shall not be entitled to recover from the company for any loss which he may sustain thereafter; provided that a demand in writing has been transmitted, by registered letter to such member for payment of the same before such loss occurred."

This article reproduces R. S. Q., art. 5321.

In Ontario a similar provision is contained in R. S. O., 1897, c. 203, s. 131; in Manitoba, in R. S. M., c. 85, s. 49; in Alberta and Saskatchewan, in Cons. Ord. N. W. T., c. 120, s. 57; in Britirsh Columbia, in 2 Ed. VII., c. 35, s. 50; and in Nova Scotia by 3 and 4 Ed. VII., c. 46, s. 42.

But in the Provinces of Ontario, Manitoba, Alberta, Saskatchewan and Nova Scotia, the section contains an additional provision not found in the Quebec or British Columbia Acts, by which the policy becomes revived upon payment of the assessment. Such provision, however, is unnecessary if the company accept the assessment with knowledge of the default. *Vide* "Void and Voidable", supra p. 138.

The forfeiture declared by Art. 5321(40) R. S. Q., against the insured in a mutual insurance company for neglect to pay his assessments within six months after they are due, only takes place when the company, after the notice required to render the assessment exigible, has addressed to the insured another notice informing him that in default of payment within the specified delay he will lose his right to an indemnity; and this is especially so when the company, after the expiration of the delay, have accepted payment of the premiums in arrear. (41)

(40) Art. 6450 in the Report upon the New Revision.

(41) Thuot *vs* Montmagny Mutual Fire Ins. Co., Q. R., 10 Q. B., 104.

ASSESSMENTS SECURED BY LIEN UPON INSURED PROPERTY.

Quebec Insurance Act, art. 192 (*R. S. Q., art.* 5322):

"To secure the payment of all assessments which may be imposed on the deposit notes of the members, the company shall have a privilege upon the whole of the moveable property of the insured, and also a hypothec, from the date of the deposit note, upon the immoveable property mentioned in the policy of insurance, as well as upon the real estate thereunto appertaining.

"Notwithstanding articles 1994 and 2009 of the Civil Code, such privilege shall rank and take precedence after municipal taxes and rates, and shall remain in force and be valid in law for the same time.

"Such hypothec exists without registration."

Quebec Insurance Act, art. 193 (*R. S. Q., art.* 5323):

"Whenever properties, affected by the privilege or hypothec of the company, are advertised to be sold by forced sale, the secretary-treasurer of the company or his assistant shall file, within the six days following the sale, in the office of the prothonotary of the Superior Court or of the clerk of the Circuit Court or of the curator, as the case may be, a claim for all assessments due, and for such as shall become due up to the end of the then current fiscal year; and the company shall have the right to be collocated for the amount of the said claim on the proceeds of such sale according to the privilege and rank established by article 192."

These articles reproduce substantially R. S. Q., arts. 5322 and 5323 respectively, but art. 192 differs from R. S. Q., art. 5322 in providing that the hypothec shall exist without registration.

It has been pointed out supra p. 501, that the hypothecation of the property of the members of the company formed one of the most characteristic features of the Mutual Insurance Companies Acts both in Upper and Lower Canada for many years after the first legislation in 4 and 6 Wm. IV. respectively, and that this provision was dropped in Ontario in 1873 upon the consolidation of the Mutual Companies Acts, 36 Vict., c. 44.

A similar clause never formed part of the Mutual Insurance legislation in any of the other provinces of Canada, but as these articles indicate, it has ever since been retained in the Province of Quebec.

CHARGE ON PROPERTY.

By s. 67 of C. S. U. C., c. 52, all the right or estate of any party effecting an insurance with a mutual insurance company, in the property insured, at the time of effecting the same, is subject to all claims against the assured under such insurance; and a purchaser, taking a conveyance from the assured, will take subject to the charge of the company although without notice, and that although such charge does not appear on the registry affecting the property; the registry laws not providing for the registration of such charge. (42)

EXPERTISE.

R. S. Q., arts. 5324, 5325, 5326, 5327, 5328, 5329, 5330.

All these articles, which provide in case of loss for an *expertise,* are repealed by the Quebec Insurance Act, 8 Ed. VII., c. 69, and the insured now, under the new Act, is compelled to rely solely upon the arbitration section 16 of the statutory conditions.

These articles were peculiar to the Province of Quebec, having their origin in the original Mutual Insurance Companies Act, 4 Wm. IV., c. 33.

As pointed out, supra p. 505, the corresponding section in the Province of Ontario was dropped in 1887, and no similar provision was ever incorporated in the Mutual Insurance legislation of the other provinces.

Arbitration in the other provinces except Nova Scotia is governed by the statutory conditions; in the latter Province by 3 and 4 Ed. VII., c. 46, s. 51.

(42) Montgomery *vs* Gore District Mutual Ins. Co., 10 Gr., 501.

PRESCRIPTION.

R. S. Q., art. 5331:

"No action or suit shall be brought against such company upon any policy or contract of insurance after the lapse of one year next after the happening of the loss or damage, in respect of which such action or suit is brought, saving in all cases the rights of parties under legal disability.

"All policies to be issued by such company shall have a condition to that effect endorsed thereon."

This article is repealed by the Quebec Insurance Act, 8 Ed. VII., c. 69. Actions, however, are still prescribed by statutory condition No. 22. Actions are also prescribed in one year by the statutory conditions of all the other provinces of Canada, except Nova Scotia where 3 and 4 Ed. VII., c. 46, s. 52 makes a similar provision.

Vide Statutory Condition No. 22, supra p. 478.

EXECUTION.

Quebec Insurance Act, art. 194 (*R. S. Q., art.* 5332):

"No execution shall issue against the company upon any judgment, until after three months from the rendering thereof."

This article is a reproduction of R. S. Q., art. 5332. The corresponding provision limiting the time within which execution may issue against mutual companies is contained in Ontario, R. S. O., 1897, c. 203, s. 141; Alberta and Saskatchewan, Cons. Ord. N. W. T., c. 120, s. 73; and British Columbia, 2 Ed. VII., c. 35, s. 60, where the execution is restrained for only 60 days; in Manitoba the time within which execution may issue is three months, R. S. M., c. 85, s. 59. In Nova Scotia the time limit is also three months (3 and 4 Ed. VII., c. 46, s. 55.)

How far this article is applicable to mutual insurance on the cash premium system, vide, infra p. 550.

RECUSATION OF JUDGE.

Quebec Insurance Act, art. 195:

"195. The interest any judge may have in the issue of any suit to which any existing mutual fire insurance company in this Province, or any company formed under section II, is a party, by reason of his being a member of such company, shall not be sufficient cause for his recusation in such case."

This is new. There is no corresponding provision in the legislation of any of the other provinces of Canada.

MISREPRESENTATION. — MANITOBA. — NOVA SCOTIA.

In the legislation relating to Mutual Insurance Companies in all the provinces of Canada except Manitoba and Nova Scotia, the provisions voiding the policy for misrepresentation, or for failure to communicate a change material to the risk, are contained in the statutory conditions Nos. 1 and 3 only. In the Provinces of Manitoba and Nova Scotia, however, there is exceptional legislation similar to what is to be found in the old Consolidated Mutual Insurance Act, 36 Vict., c. 44, s. 36, which voids the policy for misrepresentation as to title or ownership, or for concealment of incumbrances on the insured property, or for failure to notify the company of a change in title or ownership. This provision is contained in R. S. M., c. 85, s. 42, and N. S., 3 and 4 Ed. VII., c. 43, s. 34.

The jurisprudence in Ontario, prior to 1874 when the statutory conditions were introduced is still applicable in Nova Scotia and would appear applicable also to the Province of Manitoba, notwithstanding that the statutory conditions in the latter province are applicable to Mutual Companies. *Vide*, supra p. 365.

ASSESSMENT BY THE COURT.

The defendants, a mutual insurance company, in existence at the time of the passing of the Mutual Companies' Act of

1873, 36 V., c. 44 (O), had divided their business into several branches, and had also raised a guarantee capital fund, out of which the losses in all the branches as they arose were paid. The by-law for raising the guarantee fund, passed on the 12th January, 1874, contained a provision that from the surplus profits of the company from year to year, and by assessment on premium notes, a reserve fund should be created for the purpose of paying off the guarantee capital. In a suit by a creditor to realize the assets of the company it appeared that the amounts to be collected on the premium notes in two branches, would not suffice to pay the losses in those branches, and that the amounts to be collected on such notes in the other two branches were sufficient for that purpose. It was held, 27 Gr., 391, that the policy holders in the solvent branches were liable to be assessed on their premium notes for the purpose of paying off the liability due to the guarantee stockholders so far as might be necessary to discharge losses paid in those particular branches from the guarantee fund. Held, on appeal, that whatever might be the power of the directors, the court of chancery had no jurisdiction to make the assessment. (43)

CASH PREMIUM INSURANCE.

In addition to the business of purely mutual insurance which was all that was contemplated by the earlier legislation, the companies in later years obtained power to carry on business on what has been called the cash premium plan. This authorized the company to make a contract of insurance by which the insured, just as in a stock company, was required to pay a certain stipulated premium in cash, which covered his entire liability to the company, and he in no respect became responsible for its debts and liabilities.

In Ontario a cash Mutual Company is defined as follows: "a

(43) Duff *vs* Canadian Mutual Ins. Co., 6 A. R., 238. *Vide* also, Hill *vs* Merchants & Manufacturers Ins. Co., 28 Gr., 560.

company organized to transact mutual insurance, but empowered to undertake contracts of insurance on both the cash plan and the premium note or mutual plan."

According to Mr. Justice Gwynne, (44) power to carry on this class of insurance was conferred in 1859 in Ontario by 22 V., c. 46, s. 4. This was carried into the consolidation of that year as s. 24, in the following language:

"Any such company may collect premiums in cash for insurance and for terms not longer than one year..." (45)

TERM OF INSURANCE IN ONTARIO.

The Ontario Insurance Act would appear to have two inconsistent provisions as to the period for which a contract of insurance may extend.

The Revised Statutes of Ontario, 1877, c. 161, s. 32, relating to Mutual Companies, provided that the company might issue policies for a term not exceeding five years, and by s. 75 they were authorized to issue policies on the cash premium principle for three years on non-hazardous property, and one year on any other class of property.

When the various insurance acts were consolidated by 50 V., c. 26, section 106, which had its origin in the Mutual Insurance Act, R. S. O., c. 161, the consolidation limited the extreme period of insurance to three years for all companies, but at the same time retained the provisions in s. 75 of the Mutual Companies Act which expressly limited the period of Mutual Insurance on the cash premium principle to three years on non-hazardous property.

These sections were carried into the revision of 1887, as secs. 106 and 135 respectively.

In 1889, an amendment was made to s. 106 which provided that "notwithstanding anything in this section contained, contracts of fire insurance by any mutual or cash mutual fire in-

(44) Ellis *vs* Beaver Ins. Co., 21 U. C. C. P., 84.
(45) C. S. U. C., c. 52, s. 24.

surance company may be for any term not exceeding four years", but the legislation omitted to amend s. 135.

This inconsistency is still retained in the revision of 1897, and we find that while s. 167 authorizes insurance on a mutual or cash mutual plan to extend for a period of four years, s. 140 limits the contract in cases of cash mutual companies to a period of three years.

Term of insurance. — Quebec.

In Quebec, art. 5294 provides that a mutual fire insurance company may insure on the cash premium principle for a period not exceeding three years on farm and other non-hazardous property, and for one year or less on any other class of property. This is reproduced in the Quebec Insurance Act, 8 Ed. VII., c. 68, as art. 176.

Application of Mutual Insurance Legislation to Cash Premium Insurance.

A question arose at an early stage in the history of Mutual Insurance Companies with respect to the application of the clauses of the Mutual Insurance Companies Act to cash premium insurance, which was not based upon the mutuality of liability, but in which the insured, upon payment of his cash premium, was not assessed for any of the losses or liabilities of the company.

The matter was first discussed in relation to companies which, under their charter of incorporation, had a stock or proprietory branch in which they were entitled to insure on the cash premium system, as well as a purely mutual branch, and the courts were called upon to determine whether policies issued for a cash premium were governed by the sections of the Mutual Companies Act, some of which were, on their face, only applicable to cases of purely mutual insurance.

The question is one of more than academic interest, inasmuch as in all the provinces the Mutual Insurance Act prevents exe-

cutions being issued upon judgments against mutual insurance companies for a period of two or three months, infra p. 550. And in some of these there are other provisions which, either historically or on their face, appear inapplicable to insurance on the cash premium system. This question has been dealt with in the Courts of Ontario.

The matter first came up before the Court of Common Pleas in 1871. (46) At that time the mutual insurance companies were governed by the Consolidated Statutes of Upper Canada, c. 52, with some amendments which are not necessary to discuss.

In this case, the defendant company had been incorporated by a special act by which it was authorized to have separate branches, mutual and proprietory, and the members were divided similarly into two classes. The act contained no reference to the mutual companies' general statute law.

Mr. Justice Gwynne reviews the legislation up to that date and points out that there is nothing in the Mutual Companies Act which contemplated a person effecting an insurance by paying a cash premium at the time of the insurance to cover his liability in respect of, or in consideration for, the insurance effected. And in this case, where the insured had paid a cash premium, he held that it must be assumed that his policy was intended to be issued in the proprietory branch, and that, therefore, the provision of the Mutual Companies Act in question did not apply.

At the same term of the court the question was again raised where the defence of the company was that under the statute, if the insured had a title in fee simple unincumbered, the policy would be valid, but not otherwise; but if he had a less estate, or if the premises be incumbered, the policy should be void. The defendants alleged that the plaintiff's application represented that the premises were held in fee simple, but that the true title was not expressed and the policy was voided.

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(46) Storms *vs* Canada West Farmers Mutual Ins. Co., 22 U. C. C. P., 75.

In giving judgment, Gwynne, J., says: "The policy being produced in this case, shews that it was not a policy of Mutual insurance, but that it was issued upon the cash premium principle, which premium is by the policy acknowledged to have been paid, and the policy itself has endorsed on it a notice to the insured, which declares the effect of a policy issued for a cash premium as follows: 'In the cash system the premium note is wholly dispensed with, and the assured is under no liability beyond the premium he has paid.' Now with this declaration endorsed by the defendants themselves upon this policy, how can it be contended that, in virtue of the policy, the company have, under the provisions of the Mutual Insurance Companies' Act, a lien on the land of the insured to secure liabilities which do not exist? The defence which is set up by the plea being rested upon a clause in the statute, which, in my judgment, relates to policies of Mutual Insurance only, and this policy not being such a policy, the plea which alleges that the plaintiff, under and in virtue of his policy, became a member of the company, and subject to the provisions of the Act which is pleaded in bar to his recovery, is not proved, but, on the contrary, is disproved by the production of the policy. The verdict, therefore, should be set aside and judgment entered for the plaintiff. (47)

It will be perceived that the language used by the learned judge in this case is applied not to a company which by its charter was entitled to insure on the cash premium system in a proprietory branch, but to a purely mutual company incorporated and licensed to do business solely under the general Mutual Company's Act, C. S. U. C., cap. 52.

The same learned judge, a few years later, held, however, that the clauses of the Consolidated Mutual Act, 36 V., c. 44, which voided the policies for non-disclosure of other insurance, were applicable to policies issued on the cash premium system as well as to those which were purely mutual, by virtue of the 77th sec-

(47) White *vs* Agricultural Mutual Ins. Co., 22 U. C. C. P., 98.

tion of that Act which expressly made it apply to every mutual fire insurance company whether incorporated under the Consolidated Acts or by any special Act. (48)

In the next year, it was held that s. 52 of the Consolidated Act, 36 V., c. 44, which made the loss payable three months after proofs of loss, did not apply to insurance policies issued on the cash premium system. (49)

The matter next came up in Ontario in 1881, where a company by its act of incorporation was divided into two branches, mutual and proprietory. The company was debarred from taking extra hazardous risks in the mutual branch. A policy was issued on the premium note system, and the defence of the company was that the risk being extra hazardous, and there being no power in the company to insure such a risk in the mutual branch, the policy was void. Burton, J. A., points out that there was nothing on the face of the policy which referred to the insured as being a member of the company, and finally holds that the risk must be taken to have issued in the other branch. (50)

The same case came before the Court of Appeal a year or two later, the question there being whether or not the provision of the Consolidated Mutual Act, then contained in R. S. O., 1877, c. 161, s. 61, which provided that no execution should issue against any company until after the expiration of three months from judgment, applied to a policy issued on the cash premium system. Mr. Justice Burton thus deals with the section:

"Looking at the object with which the section in question was at first introduced in relation to these companies, which were originally restricted to making assessments after the losses occurred, the first impression one would form of such a provision would be that it could only be intended to apply to a judgment upon a policy issued to a member upon the mutual principle;

(48) Fair *vs* Niagara District Mutual Ins. Co., 26 U. C. C. P., 398.

(49) Welsh *vs* Niagara District Mutual Ins. Co., 27 U. C. C. P., 134.

(50) Lowson *vs* Canada Farmers Mutual Ins. Co., 6 A. R., 512.

but when we come to examine the various Acts relating to mutual insurance, and find how completely the principles regulating insurances of that character have been lost sight of; that the companies have power to assess for any sums, as the directors may determine, and without reference to any actual loss; and that the assets of the company, including the premium notes, are made liable for losses which arise under insurances for cash premiums, it seems difficult to say for what purpose the section is retained at all.

"It must not, however, be lost sight of that the particular enactment, which is to be found in the Revised Statutes, and which we are now called upon to construe, was passed at a time when, as I humbly conceive, the Legislature had come to adopt a much safer and more reasonable policy in reference to mutual insurance companies than they had previously done, and from which I regret to add they have in subsequent legislation wholly departed.

"By the 36 Vict., ch. 14, s. 51, which is the act to be found in the Revised Statutes, as sec. 55, it was declared that no mutual insurance company incorporated under that Act, or the revised Act, should issue policies otherwise than upon the mutual principle. All the enactments in it have reference to such insurances; although the rights of certain companies incorporated before the 29th March, 1873, are, by section 75, with certain modifications, preserved to them.

"The other clauses deal, however, with and were intended to apply only to mutual policies; and when we turn to the clauses under the heading 'Payment of losses', where this particular section is found, we find they all refer to members.

"Here the general effect of the Act was, to regulate mutual insurance companies, and we should not expect to find a clause in it altering the general policy of the law, unless of course no other sense can reasonably be applied to it. That general policy is, that whenever a creditor obtains a judgment in a Court of Law he can at once issue execution. Reasons existed which in the case of mutual insurance rendered it desirable, in the opin-

ion of the Legislatures, to defer execution for six months, originally, now reduced to three.

"If the Revised Statutes had omitted sec. 77, making its provisions applicable to certain companies then in existence, could there be the slightest doubt as to the meaning of sec. 61? It would mean clearly and unmistakably that in the case of a judgment obtained upon a mutual policy execution shall not issue under three months, and would not extend to a judgment obtained against this same company in an action for libel, or for goods sold and delivered to them. Is that construction to be altered, and a wider interpretation given to it, because it is declared that it shall apply to certain companies which besides doing a mutual business are authorized to do something else? It is the clause as it is, that is to say: as applying to judgments recovered upon a mutual insurance policy, which is imported into the other Act, and it is not to receive any different interpretation when so imported than it would have borne had sec. 77 been entirely omitted. It is, in other words, to extend to such companies where losses are sustained upon a mutual policy the rights which an ordinary mutual insurance company, not doing a general insurance business enjoys as to the delay in issuing execution.

"The result is, that this company, which by its special Act was entitled to no delay, even in the case of mutual policies, becomes under this Act entitled to a delay of three months; but no reason whatever exists for extending it to those policies which, under its charter, it can issue to strangers under the general or proprietory branch of its business."

Following the same line of argument, why should art. 5303 (51) which voids the policy if at the time of the loss the insured has not the title or estate which he possessed at the time of effecting the insurance, and which as above mentioned must be read in connection with art. 5322 (52) hypothecating his immoveable,

(51) Art. 6432 in the Report upon the New Revision.
(52) Art. 6451 in the Report upon the New Revision.

apply to a policy on the cash premium system where the insured has no liability for the losses of other members of the company? The same argument may be made with reference to articles 5331 (53), and 5332 (54) and which, on the reasoning of the learned judge above mentioned should apply only to policies of mutual insurance, while cash premium policies would be governed by the general articles of the Civil Code.

This review of the Ontario decisions would appear to indicate that where a company has been organized under the Mutual Insurance Act, and the legislation contains provisions which clearly have reference solely to the peculiar characteristics of mutual companies, that is companies in which all the members give their premium notes, which are liable to assessment for all losses and expenses of the company, and if, by the same or subsequent legislation, these mutual companies are given the power to insure on the cash premium system, the court, in considering the company's defences in an action on a cash premium policy, may hold that notwithstanding the fact that there are clauses in the legislation which are general in their terms and might be deemed to apply to all policies issued by the company, nevertheless, these clauses will be construed as applying only to policies issued on the purely mutual system.

We have now to consider how far these Ontario decisions affect the legislation which now is found in the different provinces of Canada, whereby in the case of mutual companies, execution is prevented from being issued against the company until a certain time has elapsed after the entry of judgment, or the legislation contains some other provision which can only have been intended to apply to cases of purely mutual insurance.

Provisions staying execution.

The provision staying execution differs in the different provinces of Canada.

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(53) Art. 6460 in the Report upon the New Revision.
(54) Art. 6461 in the Report upon the New Revision.

Ontario.

The Ontario section reads as follows: (55)

"141. (1). No execution shall issue against a mutual or cash-mutual company upon a judgment until after the expiration of sixty days from the recovery thereof, but this section shall not apply to any judgment recovered on any policy or undertaking of the company issued or given where more than sixty per centum of the premium, or premium note, or undertaking, was paid in cash at the time of the insurance or the application therefor."

This provision makes it clear that the Legislature recognized the distinction between policies issued on the purely mutual and those on the cash premium system, so far as the stay of execution is concerned, and carries into effect the jurisprudence of the Ontario courts by providing that the provision restraining the issue of the execution should not apply to policies on the cash premium system.

Manitoba.

The only two sections as to which any question might arise respecting their application to cash premium policies are s. 42, which voids the policy for concealment of incumbrances, or where there has been a change of title or ownership, and s. 59, which delays the issue of execution.

S. 42 is a clause which is copied from the Ontario Mutual Insurance Companies Act, and originated at a time when the premium note operated as a lien or incumbrance upon the insured's property. It is, therefore, not a clause which should have any application to a cash premium policy. Similarly, the clause respecting executions originated at a time when the company could only pay judgments by levying an assessment upon the premium notes and therefore required a reasonable amount of time in which to raise the money. On principle, therefore, neither of these sections should apply to a cash premium policy of insur-

(55) R. S. O. 1897, c. 203, s. 141.

ance, but inasmuch as in the Province of Manitoba, the legislation has been introduced from the first in substantially its present form, it is not possible to apply to these clauses the argument which was presented so forcibly in the Ontario Courts, where it was held that in view of the course of legislation, and the objects of mutual insurance legislation, clauses similar to these should be limited to purely mutual policies. Accordingly we cannot apply the canon of construction that "however general the words of an enactment may be they are to be constructed as particular, if the intention be particular: in other words, they must be used in reference to the subject matter in the mind of the Legislature, and to it only." But on the contrary, it appears to me that the rule expressed by the Master of the Rolls in Nuth *v.* Tamplin (56) applies here, namely, that anyone who contends that a section of an Act of Parliament is not to be read literally, must be able to show one of two things, either that there is some other section which cuts down its meaning, or else that the section itself is repugnant to the general purview of the Act. Where, as in this province, in the original legislation which authorizes insurance on both the premium note and the cash premium system, there is an express clause which provides that a concealment of incumbrances or changes in title or ownership should void the policy, and that no execution should issue against the company upon any judgment until after three months, it appears to me that it can only be held that these sections apply to policies issued upon both the mutual and the non-mutual system, and that there is no such clear case of repugnancy in this case as would warrant a construction such as was given effect to in the early Ontario cases above referred to.

Alberta and Saskatchewan.

In Alberta and Saskatchewan, the provisions for cash premium insurance are contained in Cons. Ord. N. W. T., c. 120, ss. 66 and 67, which read as follows:

(56) 8 Q. B. D., 253.

"66. A mutual company may effect policies of insurance on the cash premium plan for periods not exceeding one year and the directors shall prepare a tariff of rates for such policies but no single risk shall be undertaken of a larger amount than two thousand dollars."

"67. Policy holders under the cash plan shall not as such be members of the company or have any liability for its debts or obligations."

There is also a provision for separating the business into branches.

The provision delaying the issue of execution is contained in s. 73, which reads as follows:

"73. In the event of judgment being obtained against a mutual company the issue of execution shall be stayed for sixty days from the date of judgment."

The view above expressed respecting the legislation in the Province of Manitoba would seem to be equally applicable to the Provinces of Alberta and Saskatchewan.

British Columbia.

2 E. VII., c. 35, s. 60, reads as follows:

"In the event of judgment being obtained against a mutual company, the issue of execution will be delayed for sixty days from the date of judgment."

In this province also the view above expressed respecting the legislation in the Province of Manitoba would seem to be equally applicable.

Nova Scotia.

3 and 4 E. VII., c. 46, s. 49, provides as follows:

"Any mutual fire insurance company to be incorporated under this Act shall not issue policies otherwise than on the mutual principle."

We find, however, that s. 79 and following provide that mutual companies may also carry on business upon the stock system, in which event the premium is made payable in cash and the insured does not become a member of the company or liable for any of the losses or expenses of the company. Although we cannot base the conclusion upon any anterior legislation in Nova Scotia, such as obtained in Ontario, supra, p. 544, it would nevertheless appear in view of the provisions of the act itself and the reasoning upon which the Ontario jurisprudence with respect to the same matter is founded that policies issued in this province by Mutual Companies on the joint stock system are not subject to the provisions of sections 28 to 57, both inclusive, but only to the Fire Insurance Policies Act, R. S. N. S. c. 147.

Quebec — Cash Premium Insurance.

If we consider the course of legislation respecting mutual insurance companies in the Province of Quebec, we find that its history is in most respects very similar to that in the Province of Ontario. The different Mutual Acts were consolidated in 1882 by 45 V. c. 51, and that Act deals solely with purely mutual insurance and makes no provision whatever for insurance on the cash premium system. It was not until 1884, by 47 V. c. 76, s. 8, that a provision was made for insurance on the cash premium system. That section reads as follows:

"Any Mutual Fire Insurance Company may, after a by-law to that effect has been first approved by a majority of its members at a meeting to be convened as directed in the fourth section of this act, effect any insurance upon the cash premium principle, for a period not exceeding three years, on farm and other non-hazardous property, and for one year or less on any other class of property;

"The amount of cash insurances in any one year shall be limited, so that the cash premiums received thereon during any one year shall not be in excess of one-half of the amount still payable

in respect of premium notes or undertakings on hand on the thirty-first day of August of the previous year, according to the statement made under section 74 of the Act 45, Victoria, chapter 51;

"All the property and assets of the company, including premium notes or undertakings, shall be liable for all losses which may arise under insurances for cash premiums;

"Any such company may also create or possess, according to the provisions of the aforesaid act and its amendments, a guarantee capital or reserve fund for the security of the policy holders in such company, under this section."

The Act of 1882, contained, in clause 9, the usual characteristic provisions which was always deemed necessary to fully protect the insured where the most substantial provision by which payment of losses was guaranteed, was a lien for the assessment upon the moveable and immoveable property of the members of the company, and as a correlative to this clause the Act provided by s. 30, that the policy should be binding on the company if the insured had at the time of the damage the title or estate described by him at the time of effecting the insurance to the land on which the property damaged by fire was situate, but that if the insured had a less title or estate, or if the same was incumbered otherwise than as described, the policy should be void.

S. 34 provided that alienation of the property insured should void the policy; and by s. 59 it was provided that no execution should issue against the company upon any judgment until after the expiration of three months. These sections were all reproduced in the Revised Statutes of Quebec, s. 30, appearing as art. 5303; s. 34 became art. 5307 and s. 59 became art. 5332.

We find throughout all these acts, the legislation refers to policies issued to individuals who are *members of the company*. For exemple, art. 5271 (8 E. VII., c. 69, art. 16), provides that the subscribers to the articles of incorporation and all persons thereafter effecting insurance, shall become *members of the company;* and art. 5279 (8 E. VII., c. 69, art. 161) authorizes a meeting of the *members of the company* for the election of directors. Art. 5284 (8 E. VII., c. 69, art. 166) provides that

each member of the company shall be entitled to a number of votes proportioned to the amount for which he is insured, but no member shall be entitled to vote while in arrears for *any assessment.*

Again, art. 5285 (8 E. VII, c. art. 167) provides that the directors shall be *members of the company.* Art. 5291 (8 E. VII., c. 69, art. 173) provides that all by-laws shall be approved by a majority of the *members* of the company. And art. 5299, (8 E. VII., c. 69, art. 178) provides that every *member* of a mutual insurance company shall, before he receives his policy, deposit his note or undertaking.

If separated from its context, art. 5298 (8 E. VII., c. 69, art. 177) is perhaps broad enough to make any person having a policy in the company a member thereof, but read in connection with art. 5299, which provides that every member shall, before he receives his policy, deposit his note, &c., indicates the Legislature is still dealing with individuals insuring on the mutual system, and who, by virtue of their giving a premium note, have become members of the company.

In addition, art. 5299 is simply a reproduction of C. S. L. C. c. 68, s. 6, enacted before insurance on the cash premium system was known, and which provided as follows: "Every person who at any time becomes interested in any company incorporated under this Act by insuring therein, shall be a member thereof during the time specified in his policy, and no longer, and shall, during such time, be bound by the provisions of this Act." This was reproduced in the Consolidation of 1882, 45 V. c. 51, s. 25, and from that Act carried into the Revised Statutes of Quebec as art. 5298.

In addition to this we find that in the Quebec Insurance Act, 8 Ed. VII., c. 69, art. 5298 of the Revised Statutes is amended by adding the following clause:

"If however the company does business on the fixed premium plan, no person insured under the non-mutual plan shall be interested therein except as provided by article 23 of this Act."

And on reference to article 23 (57) we find the fact again em-

(57) Supra, p. 509.

phasized that parties insured on the cash system shall not be members of the company.

This review of the legislation of the Province of Quebec, considered in the light of the Ontario decisions above referred to, would appear to show that in the Province of Quebec, under the Revised Statutes of 1888, the articles which void the policy for change of title or alienation, and limiting the time within which execution may issue, are only applicable to policies issued on the purely mutual plan.

It has already been pointed out, supra p. 514, that arts. 5303, 5307 and 5332 are repealed by the Quebec Insurance Act, 8 Ed. VII., c. 69, although the article hypothecating the property of the insured for the payment of assessments is still retained by art. 192 and one would have expected that, as the articles which have been dropped, along with the article which provided for hypothecation, originated at the same time and are interdependent and correlative with each other, the Legislature would either have retained them all or dropped them all; but such has not been the case.

Art. 5332, however, which provided that no execution should issue for three months, is reproduced in s. 17 of the Quebec Insurance Act, which deals solely with mutual fire insurance companies, and when this legislation comes into force, it is impossible to say what view the courts may take as to the application of this article to cash premium insurance. Had the articles respecting title and alienation been reproduced so that the article respecting executions formed but one of a number which, in the light of their history, had reference solely to purely mutual insurance, it might well have been contended that the Quebec Insurance Act had made no change which would alter the construction to be placed upon these sections of the Act as they appeared in the Revised Statutes. But the article relating to executions being the only one retained, it may be held by the courts that the intention of the Legislature was to make this provision apply to policies of insurance issued on the cash premium as well as upon the purely mutual system.

Non-payment of cash premium note.

The non-payment of a cash premium note given by the original assured in a mutual assurance company, the company having assented in writing to the assignment, cannot be set up against the assignee and alienee of the policy, the note being current at the time of assignment, and the alienee or assignee not being aware of its existence or non-payment. (58)

It was held, that a note, made by the insured in the mutual branch of a mutual insurance company, for the sum of $3, part of the sum of $36, for which the insured had already given his deposit or premium note, such $3 representing the portion of the deposit note payable to the treasurer for incidental expenses under C. S. U. C., c. 52, s. 22, was not a note given for a cash premium of insurance within the meaning of 29 V., c. 38, s. 5, so as utterly to avoid the policy if the note should not be paid within 30 days after the same was made payable. (59)

Municipal Council, and Municipal or Parish Mutual Insurance.

In some of the provinces there has been a further development of mutual insurance by which the class of risks has been specialized, or the risks narrowed down to include only those within a more limited area. The mutual insurance which we have been discussing generally in this chapter, is contained in Section XVII of the Revised Statutes of Quebec, and has reference solely to mutual fire insurance companies organized and provision is made for insuring not only against accidents by fire, but also to cover losses from lightning and wind.

In addition to this class of mutual insurance, provision is made in the Province of Quebec, by Section XVIII, by which nine freeholders in any parish of local municipality may form a mutual insurance company within the limits of the parish or municipality.

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(58) Storms *vs* Can. Farmers Mut. Ins. Co., 22 U. C. C. P., 75.
(59) Ellis *vs* Beaver & Toronto Mut. Ins. Co., 21 U. C. C. P., 84.

Although by it the owners of insured property form the company, its control and management are mainly vested in the municipal council, and the collection of assessments to pay losses, is made by municipal machinery in the same way as taxes are collected, and the losses are payable by a note of the company at twelve months, signed by the mayor and secretary-treasurer of the municipality. The legislation also contains a provision by which the council may manage the affairs of the company for a fixed sum of ten per cent. of the amount collected by it for the company.

Art. 5374 makes the provisions relating to County Mutual Insurance, Section XVII, applicable to such companies.

These provisions of the Revised Statutes are reproduced, with some variations, in Section VI of the Quebec Insurance Act, 8 Ed. VII., c. 69.

All policies of insurance in these companies will also be governed by the Quebec Insurance Act, by virtue of the terms of art. 203.

Diocesan Mutual Insurance.

Another class of mutual insurance in Quebec is that provided for by 63 Vict., c. 34, as subsections to art. 5348 of the Revised Statutes, by which the incumbent and churchwardens of not less than nine congregations of any Church of England Diocese may, with the approval of the Bishop, establish a mutual fire insurance company for the purpose of insuring diocesan property.

The Quebec Insurance Act (8 Ed. VII., c. 69), in repealing the articles of the Revised Statutes 5264 to 5400, expressly excepts from the repeal this addition to art. 5348. The amendment, by art. 5348f, with some unimportant exceptions, makes all the articles relating to mutual insurance in the Revised Statutes, apply to such companies, although some of these articles are no longer reproduced in the Quebec Insurance Act. For example, art. 5303, which voids the policy where there has been a change of title; 5307 which voids the policy for alienation;

5309 which voids the policy for an increase in the risk; and 5310 which voids the policy for double insurance; all of which are repealed so far as mutual fire insurance companies are concerned, by the Quebec Insurance Act, are still applicable to this class of insurance.

These companies are also governed by the statutory conditions.

Butter and Cheese Factories Mutual Insurance Companies.

4 Ed. VII., c. 38, which adds certain subsections to art. 5375 of the Revised Statutes, provides that the proprietors of twenty butter and cheese factories may form a mutual insurance company to insure their own property. The characteristic sections relating to mutual insurance, voiding the policy for change of title and for alienation, by change material to the risk, and for double insurance, are expressly made applicable to this class of insurance, and the clause of the Quebec Insurance Act (8 Ed. VII., c. 69), which repeals the articles of the Revised Statutes, except from such repeal these amendments to art. 5375.

We have therefore the same result as has been pointed out in connection with Diocesan Mutual Insurance, supra p. 559.

Similarly, the statutory conditions provided for in the Quebec Insurance Act, will also be applicable to this class of insurance.

LIVE STOCK MUTUAL INSURANCE.

In the Province of Ontario, c. 204 of R. S. O., 1897, makes provision for the organization of Live Stock Mutual Insurance Companies, and this Act contains all the statutory conditions which, from the nature of the business to be carried on, are applicable to this kind of insurance.

CHAPTER X

QUEBEC INSURANCE ACT.

By 8 E. VII., c. 69, the Legislature of the Province of Quebec passed the Quebec Insurance Act, to come into force on the day the Lieutenant Governor in Council might be pleased to fix by proclamation. (1)

This act repealed articles 5264 to 5400 of the Revised Statutes and the Acts amending the same, except articles 5348a to 5348i, both inclusive, as enacted by 63 V. c. 34, s. 1; and also articles 5375h to 5375t both inclusive, with their forms, as enacted by 4 E. VII., c. 38, s. 1, which make provision for the organization of companies to insure certain Church property and Cheese and Butter Factories. Vide, supra, p. 558.

The repealed articles included all the provisions of the Revised Statutes of Quebec, Section XVII, dealing with Mutual Fire Insurance Companies in Counties; and Section XVIII dealing with Mutual Fire Insurance Companies established by by-law of rural municipalities, and also Parish Mutual Insurance Companies.

The new act, following in that respect the Ontario Insurance Act, deals generally with all classes of insurance and provides for the incorporation of joint stock insurance companies and mutual fire insurance companies, the conversion of mutual into cash mutual companies, and of mutual and cash mutual into joint stock companies.

(1) The proclamation had not been made when this chapter went to press, but was expected every day.

The most important provisions of the act relating to fire insurance companies are the articles which introduce into the Province of Quebec the statutory conditions, which are, with some important exceptions, substantially the same as those in force in the Province of Ontario. The Act also contains articles dealing with mutual insurance, which are specially dealt with in the next preceding chapter.

In the present chapter it is proposed to consider those articles which deal with the contract of insurance, and are applicable to all fire insurance companies.

CONTRACTS DEEMED TO BE MADE IN QUEBEC.

Art. 196.

"When the subject matter of any insurance contract is property, or an insurable interest within the jurisdiction of the Province of Quebec, or is in connection with a person domiciled or resident therein, any policy, certificate, interim receipt, or writing evidencing the contract shall, if signed, countersigned, issued or delivered in the Province of Quebec, or committed to the post office or to any carrier, messenger, or agent, to be delivered or handed over to the assured, his representative or agent in the Province, be deemed to evidence a contract made in the Province and the contract shall be construed according to the law of this Province, and all moneys payable under the contract, shall be paid at the office of the chief officer or agent of the company or association effecting the insurance in this Province. This article shall have effect notwithstanding any agreement, condition or stipulation to the contrary."

This article is a reproduction verbatim of s. 143 of the Ontario Insurance Act (R. S. O. 1897, c. 203), which is discussed, supra, p. 26.

TERMS OF CONTRACT TO BE SET OUT IN THE INSTRUMENT.

Art. 197.

"1. Where an insurance contract made by any company or association is evidenced by a written instrument, the company or

association shall set out all the terms or conditions of the contract in full on the face or back of the instrument forming or evidencing the contract, and, unless so set out, no term or condition, stipulation or proviso modifying or impairing the effect of any such contract made or renewed after the coming into force of this act, shall be good and valid or admissible in evidence to the prejudice of the assured or beneficiary.

"2. Nothing contained in this article shall exclude the proposal or application of the assured from being considered with the contract, and the court shall determine how far the insurer was induced to enter into the contract by any misrepresentation contained in the said application or proposal."

Subsections 1 and 2 of this article are substantially a reproduction of subsections 1 and 1a of s. 144 of the Ontario Insurance Act (R. S. O. 1897, c. 203), the only alteration being that the word "warranty" which appears with the words "conditions, stipulation or proviso" in the Ontario Act, is omitted.

In addition, however, to the provisions of this article, there are three other subsections in the Ontario Act which are not contained anywhere in the Quebec Insurance Act, and which read as follows:

"(2) No contract of insurance made or renewed after the commencement of this Act shall contain, or have indorsed upon it, or be made subject to any term, condition, stipulation, warranty or proviso, providing that such contract shall be avoided by reason of any statement in the application therefor, or inducing the entering into of the contract by the corporation, unless such term, condition, stipulation, warranty or proviso is limited to cases in which such statement is material to the contract, and no contract within the intent of section 2 of this Act, shall be avoided by reason of the inaccuracy of any such statement, unless it be material to the contract.

"(3) The question of materiality in any contract of insurance whatsoever shall be a question of fact for the jury, or for the Court if there be no jury; and no admission, term, condition, stipulation, warranty or proviso to the contrary, contained in the

application or proposal for insurance, or in the instrument of contract, or in any agreement or document relating thereto shall have any force or validity.

"(4) Nothing in sub-sections 1, 2 and 3, of this section contained shall be deemed to impair the effect of the provisions contained in sections 168 to 173 inclusive (2), or the effect of the provisions contained in section 55 of *The Act respecting the Insurance of Live Stock.*"

Warranties in Quebec.

It will be perceived, therefore, that whereas this article only provides that the terms and conditions of the contract of insurance must all be found upon the instrument which evidences the contract, including the proposal or application, the Ontario Act goes much farther and expressly precludes the parties from entering into any warranty respecting the subject matter of insurance. In other words, it provides that no warranty shall be effectual as against the insured unless it has regard to some statement which is material to the contract. In the Province of Quebec, as has been pointed out supra p. 331 there is express provision in articles 2490 and 2491 of the Civil Code permitting of warranties being made part of contracts of fire insurance. These articles read as follows:

"2490. Warranties and conditions are a part of the contract and must be true if affirmative, and if promissory must be complied with; otherwise the contract may be annulled notwithstanding the good faith of the insured.

"They are either expressed or implied."

"2491. An express warranty is a stipulation or condition expressed in the policy, or so referred to in it as to make part of the policy.

"Implied warranties will be designated in the following chapters relating to different kinds of insurance."

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(2) These are the sections which contain the statutory conditions.

Again, Art. 205 of the Quebec Insurance Act, provides that no variation, addition or omission shall be legal and binding unless distinctly indicated by being printed in ink of a different colour and in conspicuous type, under the words "Variations in conditions". But the corresponding section of the Ontario Act contains the additional provision that no question shall be considered as to whether any such variation, addition or omission is, under the circumstances, just and reasonable, but on the contrary, the policy shall, as against the insurer, be subject to the statutory conditions only unless the variations, additions or omissions are distinctly indicated and set forth in the manner or to the effect aforesaid. In other words, the Ontario Act expressly declares that any condition printed on the policy beyond the statutory conditions, is absolutely null and void unless printed as a variation, in which event it would only be binding upon the assured if held to be just and reasonable by a court or judge.

In what position then do warranties stand under the Quebec Insurance Act? The fact that the articles of the Civil Code dealing with warranties are not repealed so far as fire insurance contracts are concerned; that in art. 197 the word "warranty", which is contained in the corresponding Ontario section, is dropped; that subsections 2, 3 and 4 of s. 144 of the Ontario Act, which expressly reduce warranties to the category of misrepresentations, have been omitted; and that the article dealing with variations drops the provision of the Ontario Act which expressly provides that unless any additional condition beyond the statutory conditions is inserted as a variation, and therefore only binding if held by the court or judge to be reasonable, the policy, as against the insurer should be subject only to the statutory conditions afford on the one hand very strong grounds for the contention that in the Province of Quebec, insurance companies under the new Act are not precluded from adding to the statutory conditions, and not as a variation, a further condition or conditions that the policy is issued upon the warranty of the assured with respect to some statement of fact, and that if the said statement is untrue the policy should be void.

Nevertheless I am of the opinion that by the Quebec Insurance Act it is no longer possible to introduce a warranty into a contract of fire insurance in that province, in the strict acceptation of that term, as construed in the chapter dealing with warranties and conditions, supra p. 330, where it is pointed out that if a statement which has been warranted is untrue, the policy is void, whether the misrepresentation is material or not, and that after the act comes into force, the law of the Province of Quebec in that regard will be the same as in the Province of Ontario, and that a warranty can only be introduced in the manner provided by art. 205, as a variation or addition to the statutory conditions, and will only be binding upon the assured in so far as it may, by a court or judge, be held to be reasonable.

To hold otherwise would nullify the entire object of the statutory conditions, which it must be presumed were introduced by the Legislature with the very object of preventing insurance companies from inserting unreasonable conditions in their policies, as is pointed out in Chapter I, p. 2, where the origin of the statutory conditions in Ontario is discussed.

If warranties could still be made part of the insurance contract, the insurance companies might require the insured to warrant all the answers which are given to the questions in the application, some of which might be in no sense material to the contract. This would be repugnant to the first statutory condition which only voids the policy where the misrepresentation is as regards some circumstance material to be made known to the company in order to enable it to judge of the risk it undertakes.

Any argument which may be adduced for a contrary view, based upon the articles of the Civil Code relating to warranties, it appears to me may be met by holding that so far as fire insurance is concerned, these articles are repealed by implication, as to which it is said by a high authority: (3)

"If the provisions of a later act are so inconsistent with or repugnant to those of an earlier act, that the two cannot stand

(3) Maxwell, on Statutes, 4th ed., p. 233.

together, the earlier stands impliedly repealed by the later. *Leges posteriores priores contrarias abrogant. Ubi duæ contrariæ leges sunt, semper antiquæ obrogat nova.*"

It has been pointed out, supra p. 341, that s. 144 of the Ontario Act, which contained the provisions of art. 197, and in addition the subsections which expressly reduced warranties to the category of misrepresentations, so far as fire insurance contracts are concerned, did no more than give statutory force to what had already become law by virtue of the judicial interpretation placed upon the statutory conditions. The Judicial Committee of the Privy Council, in dealing with the Ontario statutory conditions (4) said:

"The meaning of the legislation, though no doubt unhappily expressed, appears to be that whatever may be the conditions sought to be imposed by insurance companies, no such conditions shall avail against the statutory conditions, and that the latter shall alone be deemed to be part of the policy and resorted to by the insurers, notwithstanding any conditions of their own, unless the latter are indicated as variations in the prescribed manner."

ENTRY ON PROPERTY AFTER LOSS.

Art. 198:

"After any loss or damage to insured property, the insurance company shall have, by a duly accredited agent, an immediate right of entry and access sufficient to survey and examine the property and make an estimate of the loss or damage."

This article is a reproduction of the first part of subs. 1 of s. 145 of the Ontario Statute, (R. S. O. 1897, c. 203), the Ontario section reading as follows:

"145. (1) After any loss or damage to insured property the insurer has, by a duly accredited agent an immediate right of entry and access sufficient to survey and examine the property, and make an estimate of the loss or damage, but the insurer is not entitled to the disposition, control, occupation, or posses-

(4) Queen Ins. Co. *vs* Parsons, 7 App. Cas., 96 at p. 121.

sion of the insured property, or of the remains or salvage thereof, unless the insurer undertakes reinstatement or accepts abandonment of the property.

"(2) After loss or damage to insured property, it shall be the duty of the assured when, and as soon as practicable, to secure the insured property from damage, or from further damage, and to separate as far as reasonably may be the damaged from the undamaged property, and to notify the insurer when such separation has been made, and thereupon the insurer shall be entitled to entry and access sufficient to make an appraisement or particular estimate of the loss or damage.

"(3) At any time after the loss or damage the insurer and the assured may under a term of the contract of insurance or by special agreement make a joint survey, examination, estimate or appraisement of the loss or damage, in which case the insurer shall be deemed to have waived all right to make a separate survey, examination, estimate or appraisement thereof."

RISKS INSURABLE BY FIRE INSURANCE COMPANIES.

Art. 201.

"1. Every company licensed and registered for the transaction of fire insurance may, within the limits prescribed by the license and registration, insure and reinsure dwelling houses, stores, shops and other buildings, household furniture, merchandise, machinery, live stock, farm produce, and other commodities, against damage or loss by fire or lightning, whether the same happens by accident or any other means, except design on the part of the assured, the invasion of an enemy, or insurrection."

Sub-section 1 is a reproduction verbatim of the Ontario Act, c. 203, s. 166. (4a)

"2. Any insurance company registered under this act for the transaction of fire insurance, and lawfully insuring any mercantile or manufacturing risk against fire, may, either by the

(4a) *Vide* C. P. R. *vs* Ottawa Fire Ins. Co., supra p. 69.

same or a separate contract, insure the same risk against loss or damage arising from defects in or injuries to sprinklers or other fire extinguishing appliances."

Sub-section 2 is new, and is apparently intended to cover loss or damage by water through defects in the fire extinguishing appliances installed in the premises for the purpose of preventing fires. (5)

DURATION OF FIRE INSURANCE CONTRACT.

Art. 202.

"1. Contracts of fire insurance, with the exception of those entered into by mutual insurance companies on the mutual system which are limited to five years, shall not exceed the term of three years; and the insurance of mercantile and manufacturing risks shall, if on the cash system, be for terms not exceeding one year."

In Ontario, by c. 203, s. 167, (R. S. O. 1897), mutual companies are not permitted to issue policies for more than four years. Other insurance in that province, however, by the same section, may extend over a term of three years except insurance of mercantile and manufacturing risks, where the contract is limited to the term of one year.

"2. Any contract that may be made for one year or any shorter period, on the deposit note system, or for three years or any shorter period on the cash system, may be renewed, at the discretion of the board of directors, by a renewal receipt instead of a policy, on the insured paying the required premium, or, in the case of a contract on the deposit note system, by giving a new deposit note or undertaking; and any cash payments or deposit notes for renewal, must be made at the end of the year or other period for which the deposit note was granted, otherwise the policy shall be null and void."

Art. 202, ss. 2, is a reproduction of the Ontario Statute, c.

(5) Hawthorne vs Canadian Casualty Co., 39 Can. S. C. R., 558.

203, s. 167, ss. 2, the only difference being that the assessment system which obtains in mutual insurance companies is spoken of in the Ontario Act as the "premium note" system, while in Quebec it is called the "deposit note" system.

"3. No registered company, authorized to effect insurance against fire in this Province, shall incur liability upon a single risk, to an amount exceeding 10 per cent. of its capital and surplus, unless such excess is reinsured in another company.

"4. The Provincial Treasurer may suspend or cancel the license or registration of a company that assumes a heavier responsibility on a single risk than that permitted by paragraph 3 of this article."

Art. 202, ss. 3 and 4 have no corresponding sections in Ontario.

STATUTORY CONDITIONS, QUEBEC.

Art. 203.

"The conditions set forth in this article shall, as against the insurer, be deemed to be part of every contract of fire insurance hereafter entered into or renewed or otherwise in force in the Province of Quebec, with respect to any property therein or in transit therefrom or thereto, and shall be printed on every such policy with the heading "Conditions of the Policy", and no stipulation to the contrary, or providing for any variation, addition or omission, shall be binding on the assured unless evidenced in the manner prescribed by articles 204 and 205."

CONDITIONS OF THE POLICY.

This is a reproduction of the first clause of the Ontario Statute, R. S. O. c. 203, s. 168, except that in Quebec the expression "statutory conditions" is not used, but the words "Conditions of the Policy" are substituted therefor. For convenience, however, the expression *Statutory Conditions,* which has become stereotyped in all the provinces of Canada, will be retained throughout this chapter.

Condition 1.

"If any person insures his buildings or goods, and causes the same to be described otherwise than as they really are, to the prejudice of the company, or misrepresents or omits to communicate any circumstances which is material to be made known to the company, in order to enable it to judge of the risk it undertakes, such insurance shall be of no force with respect to the property in regard to which the misrepresentation or omission is made; but when the application is made out by the company's agent, such application shall be deemed to be the act of the company." (6)

The last clause of the first condition, and which is not contained in the statutory conditions of the other provinces, is of very considerable importance. The aim of this clause evidently is to throw upon the company some responsibility for the conduct of its agent in taking part in the preparation of the application. This subject is very fully discussed in the chapter on Agency, supra, p. 209, and more particularly at p. 270, where the liability of the company is expressed in the following proposition and exceptions:

"The Company is liable notwithstanding material misrepresentations in the application, if the answers to inquiries are incorrectly made by the applicant upon the advice, representations or promises of the agent soliciting the insurance and intrusted with the interim receipt, unless,

"Exception 1.

"The application clearly warns the assured that if the agent takes part in the preparation of the application he shall for that

(6) Condition 1. — Ontario stat. cond. the same as Quebec, except:
line 1, for *person* read *person or persons.*
for *his* read *his or their.*
line 6, for *with respect* read *in respect.*
line 8, *but when the application is made out by the company's agent, such application shall be deemed to be the act of the company,* is omitted.

purpose be deemed solely the agent of the applicant and not of the company, or,

"Exception 2.

"The answers to the inquiries are untrue to the knowledge of the agent and the assured; or,

"Exception 3.

"In provinces having no statutory conditions, the policy which subsequently issues expressly notifies the assured that for the purposes of the application, the agent will be deemed the agent of the applicant and not of the company."

The meaning of the Quebec clause is not clear. What is intended by the words "when the application is made out by the company's agent"? Has this reference to the agent filling in the answers of the applicant, but the application is signed by the applicant, or does it mean where the application is signed by the agent of the company for and on behalf of, and in the name of the applicant? And what is meant by the expression "such application shall be deemed to be the act of the company"? Does this mean that the applicant is not bound by the application if the agent takes part manually in any way in the filling out of the application? Until the clause has received some judicial interpretation it would appear unsafe for the agent in obtaining applications for insurance to fill in, in any way, the answers to the questions which are to form the basis upon which the company is to determine whether or not it will enter into the contract of insurance, if the company wish to rely upon the representations in the application.'

Condition 1, with voids the policy for misrepresentation or failure to communicate circumstances which are material to the risk, is fully discussed in Chapter VIII. which deals with statutory conditions, supra, p. 362.

Condition 2.

"After application for insurance, it shall be presumed that any policy sent to the assured is intended to be in accordance with

the terms of the application, unless the company points out in writing the particulars wherein the policy differs from the application." (7)

This condition is discussed supra, p. 389.

Condition 3.

"Any change in the use or condition of the property insured as defined by the policy, made without the consent of the insurer, and within the control or knowledge of the assured, and which increases the risk, shall void the policy. unless the change is promptly notified in writing to the company or its local agent; and the company, when so notified, may return the premium for the unexpired period and cancel the policy, or may demand in writing an additional premium, which the assured shall, if he desires the continuance of the policy, forthwith pay to the company; and if he neglects to make such payment forthwith after receiving such demand, the policy shall be no longer in force." (8)

This condition, with one exception, is substantially the same as the third statutory condition in Ontario, the exception being that whereas in Ontario the policy is only made void as to the part affected thereby where a change material to the risk has been made, in Quebec the entire policy is voided. The law in Quebec, therefore, by this condition, conforms to the law as laid down in Samo *vs.* Gore District Mutual Ins. Co., supra, p. 29, where it was held that the contract of insurance is indivisible.

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(7) Condition 2. — Ontario stat. cond. two, the same as Quebec, except:

line 1, For *presumed* read *deemed.*

(8) Condition 3. — Ontario stat. cond. three, the same as Quebec, except:

line 1, 2, For *in the use or condition of the property insured as defined by the policy, made without the consent of the insurer* read *material to the risk*

line 3, 4, *and which increases the risk* is omitted.

line 4, For *void* read *avoid.*

line 4, *as to the part affected thereby* is inserted after *policy.*

In this respect it will be perceived that the rule applied to the first statutory condition with respect to misrepresentation in the application, differs from that which is made to apply in the third condition. In the first condition the contract is made divisible, and although void as to part, may be valid as to the rest of the contract. Where the breach is with respect to matters covered by the third statutory condition, the policy is made void *in toto*.

With the exception just pointed out, the cases and general principles of law discussed in the chapter on statutory conditions, supra, p. 391, are applicable to the Province of Quebec.

Condition 4.

"The insurance is rendered void by the transfer of the interest in the object of it from the insured to a third person, unless such transfer is with the consent or privity of the insurer.

"The foregoing rule does not apply in the case of rights acquired by succession or in that specified in clause *b* of this paragraph.

a. The insured has a right to assign the policy with the thing insured, subject to the conditions therein contained.

b. A transfer of interest by one to another of several partners or owners of undivided property who are jointly insured does not avoid the policy." (9)

The first two clauses of this condition, together with art. 4a. are simply a reproduction of art. 2576 of the Civil Code. The jurisprudence in the Province of Quebec with respect to the provisions of this condition are found, supra, p. 114 *et seq.*

In Ontario, it was held that a transfer of interest from the

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(9) Condition 4. — The corresponding condition in Ontario reads as follows:

4. *If the property insured is assigned without a written permission indorsed hereon by an agent of the company duly authorized for such purpose, the policy shall thereby become void; but this condition does not apply to change of title by succession or by the operation of the law, or by reason of death.*

partnership to a limited liability company, in which the partners retained nearly all the stock, voided the policy. (10)

The decisions under the corresponding condition of the Ontario Insurance Act are discussed in Chapter VIII., dealing with statutory conditions, supra, p. 404.

Condition 5.

"Where property insured is only partially damaged, no abandonment of the same will be allowed unless with the consent of the company or its agent, and in case of removal of property to escape conflagration, the company will contribute to the loss and expense attending such act of salvage proportionately to the respective interests of the company or companies and the assured." (11)

This condition is a reproduction of condition 5 of the Ontario statutory conditions. The cases are collected, supra, p. 408.

Condition 6.

"Money, books of account, securities for money, and evidences of debt or title are not insured." (12)

This condition is a reproduction *verbatim* of statutory condition 6 of R. S. O. c. 203, s. 168.

Condition 7.

"Plate, plate glass, plated ware, jewelry, paintings, sculptures, curiosities, scientific and musical instruments, patterns, plans, uncoined gold and silver, works of art, articles of vertu, frescoes,

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(10) Peuchen *vs* The City Mutual Ins. Co., 18 A. R., 446, supra p. 435.

(11) Condition 5. — Ontario stat. cond. five, the same as Quebec, except:

line 2, For *with* read *by*.

line 5, For *expense* read *expenses*.

(12) Condition 6. — Ontario stat. cond. six, the same as Quebec.

clocks, watches, trinkets and mirrors are not insured unless mentioned in the policy." (13)

This condition differs from the corresponding section of the Ontario statutory conditions by including patterns and plans amongst the articles which are not insured, and omitting medals, which are articles not insured under the Ontario Act.

Condition 8.

"The company is not liable for loss if there is any prior insurance in any other company, unless the company's assent thereto appears in the policy or is endorsed thereon, nor if any subsequent insurance is effected by any other company, unless and until the company assents thereto, or unless the company does not dissent in writing within two weeks after receiving written notice of the intention or desire to effect the subsequent insurance or does not dissent in writing after that time and before the subsequent or future insurance is effected." (14)

This condition is a reproduction of statutory condition 8, Ontario, with three unimportant verbal alteration, and is fully discussed, supra, p. 411 *et seq.*

Condition 9.

"In the event of any other insurance on the property so described, having been assented to as aforesaid, then the company shall, if such other insurance remains in force, on the happening of any loss or damage, only be liable for the payment of a

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(13) Condition 7. — Ontario stat. cond. seven reads as follows:

7. *Plate, plate glass, plated ware, jewelry, medals, paintings, sculptures, curiosities, scientific and musical instruments, bullion, works of art, articles of vertu, frescoes, clocks, watches, trinkets and mirrors are not insured unless mentioned in the policy.*

(14) Condition 8. — Ontario stat. cond. eight, the same as Quebec, except:

line 3, For *in the policy* read *herein.*

For *thereon* read *hereon.*

line 8, For *future* read *further.*

rateable proportion of such loss or damage without reference to the dates of the different policies." (15)

This condition is a reproduction of statutory condition 9 Ontario. The articles of the Code dealing with the same subject, together with the corresponding Ontario condition, are contained, supra, p. 431.

Condition 10.

"The company is not liable for the losses following, that is to say:

"*a.* For the loss of property owned by any other person than the assured, unless the interest of the assured is stated in or upon the policy;

"*b.* For loss by fire caused by invasion, insurrection, riot, civil commotion, military or usurped power, earthquake or volcanic eruption;

"*c.* Where the insurance is upon buildings or their contents, for loss caused through the want of good and substantial brick or stone chimneys; or by ashes or embers being deposited, with the knowledge and consent of the assured, in wooden vessels; or by stoves or stove-pipes being, to the knowledge of the assured, in an unsafe condition or improperly secured.

"*d.* For loss or damage to goods destroyed or damaged while undergoing any process in or by which the application of fire heat is necessary.

"*e.* For loss or damage occurring to buildings or to their contents, while the buildings, are being repaired by carpenters, joiners, plasterers or other workmen, and when loss or damage to such buildings or their contents is due to such carpenters, joiners, plasterers or other workmen, unless permission to execute such repairs has been previously granted in writing, signed

(15) Condition 9. — Ontario stat. cond. nine, the same as Quebec, except:

line 1, For *so* read *herein.*

line 2, For *the* read *this.*

by a duly authorized agent of the company. But in dwelling houses fifteen days are allowed in each year for incidental repairs without such permission.

"*f.* For loss or damage occurring when petroleum, or rock-earth or coal-oil, camphene, gasoline. burning fluid, benzine. naptha or any liquid products thereof, or any of their constituent parts (refined coal-oil for lighting purposes only, not exceeding five gallons in quantity, or lubricating oil not being crude petroleum or oil of less specific gravity than required by law for illuminating purposes, not exceeding five gallons in quantity, excepted), or more than twenty-five pounds of gunpowder, is or are stored or kept in the building insured or contained in the property insured, unless permission is given in writing by the company." (16)

This condition is a reproduction of the Ontario statutory condition 10, with some variations. It will be perceived that ss. b of the condition in Quebec exempts the company from liability for loss caused by earthquake or volcanic eruption.

The verbal alterations in the other subsections do not appear to make any change from the corresponding statutory condition in the other provinces.

This condition is discussed, supra, p. 434.

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(16) Condition 10. — Ontario stat. cond. ten, the same as Quebec, except:

10a. line 1, For *person* read *party.*

10b. line 1, *by fire* is omitted.
line 2, *earthquake or volcanic eruption* is omitted.

10c. line 2, For *through* read *by.*

10e. line 3, For *and when loss or damage to such buildings or their contents is due to such carpenters, joiners, plasterers or other workmen* read *and in consequence thereof.*

10f. line 1, For *when* read *while.*
line 6, For *or* read *nor.*
line 8, *weight* is inserted after *pounds.*
line 9, For *contained in* read *containing.*

Condition 11.

"The company shall make good, loss caused by the explosion of gas in a building not forming part of the gas-works, and all other loss caused by any explosion causing a fire and all loss caused by lightning, even if it does not set fire." (17)

This condition is broader in its terms than the corresponding Ontario condition in that it expressly provides that the company shall be liable for loss caused by any explosion causing a fire. This expansion of the Ontario condition was unnecessary in view of the decision of the Supreme Court, in Hobbs *vs* Northern Assurance Co. (18) where it was held that the language in the Ontario condition made the company liable as well for the damage caused by the explosion as by the fire which followed it. The Quebec condition, however, would seem to be more extensive than that of Ontario, in that the company becomes liable for the destruction of property by lightning which is not followed by a fire.

Condition 12.

"Proof of loss must be made by the assured, although the loss be payable to a third person." (19)

This condition is discussed, supra, p. 437.

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(17) Condition 11. — Ontario stat. cond. eleven, the same as Quebec, except:

line 1, For *shall* read *will.*

line 2, For *explosion of gas* read *explosion of coal gas.*

the is omitted before *gas works.*

For *and all other loss caused by any explosion causing a fire and all loss caused by lightning, even if it does not set fire,* read *and loss by fire caused by any other explosion or by lightning.*

(18) 12 Can. S. C. R., 631.

(19) Condition 12. — Ontario stat. cond. twelve, the same as Ontario, except:

line 2, For *person* read *party.*

Condition 13.

"Every person entitled to make a claim under this policy, shall observe the following directions:

"*a.* He shall forthwith after loss give notice in writing to the company;

"*b.* He shall deliver, as soon after as practicable,as particular an account of the loss as the nature of the case permits;

"*c.* He shall also furnish therewith a sworn declaration establishing:

1. That the said account is just and true;

2. When and how the fire originated so far as declarant knows or believes;

3. That the fire was not caused through his wilful act or neglect, procurement, means or contrivance;

4. The amount of other insurances;

5. All liens, and incumbrances on the property insured;

6. The place where the property insured, if moveable, was deposited at the time of the fire.

"*d.* He shall, in support of his claims, if required and if practicable, produce books of account, warehouse receipts and stock lists, and furnish invoices and other vouchers, and also copies of all his policies; and shall separate, as far as reasonably may be, the damaged from the undamaged goods, and exhibit for examination all that remains of the property which was covered by the policy.

"*e.* He shall produce, if required, a certificate under the hand of a magistrate, notary, commissioner for taking affidavits, or municipal clerk, residing in the vicinity in which the fire happened, and not concerned in the loss or related to the assured or sufferers, stating that he has examined the circumstances attending the fire, loss or damage alleged, that he is acquainted with the character and circumstances of the assured or claimant, and that he verily believes that the assured has, by misfortune and

without fraud or evil practice, sustained loss and damage in respect of the property assured to the amount certified." (20)

This condition, with a few unimportant verbal changes, is a reproduction of the Ontario statutory condition 13, and is fully discussed supra, p. 438.

Condition 14.

"The above proofs of loss may be made by the agent of the assured, in case of the absence or inability of the assured himself to make the same, such absence or inability being satisfactorily accounted for." (21)

This condition is a reproduction *verbatim* of the Ontario condition 14, vide, supra, p. 457.

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(20) Condition 13. — Ontario stat. cond. thirteen, the same as Quebec, except:

line 1, For *every* read *any.*
line 1, For *shall* read *is to.*
13a. line 1, For *shall* read *is.*
For *give* read *to give.*
13b. line 1, For *shall* read *is to.*
13c. line 1, For *shall also* read *is also.*
line 2, For *establishing* read *declaring.*
line 4, *the* is inserted before *declarant.*
line 9, For *property insured* read *subject of insurance.*
The subdivisions of 13c are not numbered.
13d. line 1, For *shall* read *is.*
line 2, For *produce* read *to produce.*
line 3, 4, For *and also copies of all his policies* read *to furnish copies of the written portion of all policies*
line 4, For *and shall* read *to.*
line 5, *to* is inserted before *exhibit.*
13e. line 1, For *shall* read *is to.*
line 2, For *notary* read *notary public.*
line 9, 10, For *in respect of the property* read *on the subject.*

(21) Condition 14. — Ontario stat. cond. fourteen, the same as Quebec.

Condition 15.

"Any fraud or false representation in relation to any of the above particulars, shall vitiate the claim." (22)

This condition is discussed supra, p. 457.

Condition 16.

"If any difference arise as to the value of the property insured, of the property saved or the amount of the loss, such value and amount and the proportion thereof (if any) to be paid by the company, shall, whether the right to recover on the policy is disputed or not, and independently of all other questions, be submitted to the arbitration of some person to be chosen by both parties, or if they cannot agree on one person, then to two persons, one to be chosen by the party assured and the other by the company, and a third to be appointed by the two persons first chosen, or, on their failing to agree, then by a judge of the Superior Court sitting in the district wherein the loss has happened; and such reference shall be subject to the provisions of articles 1431 and following of the Code of Civil Procedure. The award shall, if the company is in other respects liable, be conclusive as to the amount of the loss and proportion to be paid by the company. Where the full amount of the claim is awarded the costs shall follow the event, and in other cases, all questions of costs shall be in the discretion of the arbitrators." (23)

This condition is discussed supra, p. 464.

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(22) Condition 15. — Ontario stat. cond. fifteen, the same as Quebec, except:

line 1, For *representation* read *statement in a statutory declaration.*

(23) Condition 23. — Ontario stat. cond. sixteen, the same as Quebec, except:

line 2, For *the amount* read *of amount.*

line 9, *two* is omitted before *persons*
For *first* read *so.*

line 10, 11, For *a judge* read *the County Judge.*

line 11, For *Superior Court sitting in the district* read *county.*

line 13, For *articles* 1431 *and following of the Code of Civil Procedure* read *The Arbitration Act.*

line 14, For *The award* read *and the award.*

Condition 17.

"The loss shall not be payable until sixty days after completion of the proofs of loss, unless otherwise provided for by the contract of insurance." (24)

This condition is discussed supra, p. 469.

Condition 18.

"The company, instead of making payment, may repair, rebuild or replace, within a reasonable time, the property damaged or lost, giving notice of their intention within fifteen days after the receipt of the proofs herein required." (25)

This condition is discussed supra. p. 472.

Condition 19.

"The insurance may be terminated by the company, by giving notice to that effect, and, if on the cash plan, by tendering therewith a rateable proportion of the premium for the unexpired term, calculated from the termination of the notice. In the case of personal service of the notice, five days' notice, excluding Sunday, shall be sufficient. Notice may be given by any company having an agency in the Province of Quebec, by registered letter addressed to the assured at his last post office address notified to the company, and where no address has been notified, then to the post office of the agency from which the application was received, and, where such notice is by letter, then seven days from the arrival at any post office in the Province shall be deemed good notice. The policy shall cease after such tender and notice aforesaid, and the expiration of the five or seven days as the case may be.

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(24) Condition 17. — Ontario stat. cond. seventeen, the same as Quebec, except:

line 1, For *completion* read *the completion.*

(25) Condition 18. — Ontario stat. cond. eighteen, the same as Quebec, except:

line 4, For *the receipt* read *receipt.*

"The insurance, if for cash, may also be terminated by the assured, by giving written notice to that effect to the company or its authorized agent, in which case the company may retain the customary short rate for the time the insurance has been in force, and shall pay to the assured the balance of the premium paid." (26)

This condition is discussed supra, p. 473.

Condition 20.

"No condition of the policy, either in whole or in part, shall be deemed to have been waived by the company, unless the waiver is clearly expressed in writing, signed by an agent of the company." (27)

This condition is discussed supra, p. 478.

Condition 21.

"An officer or agent of the company, who assumes on behalf of the company to enter into any written agreement relating to any matter connected with the insurance, shall be deemed *primâ facie* to be the agent of the company for such purpose." (28)

This condition is discussed supra, p. 478.

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(26) Condition 19. — Ontario stat. cond. nineteen, the same as Quebec, except:

line 6, For *shall be sufficient* read *shall be given.*
line 7, For *the Province of Quebec* read *Ontario.*
line 9, For *and* read *or*
has been is omitted before *notified.*
line 12, 13, For *the Province* read *Ontario.*
line 13, For *the* read *and the.*
line 16, The second paragraph of condition is preceded by (*a*).
line 20, For *pay* read *repay.*

(27) Condition 20. — Ontario stat. cond. twenty, the same as Quebec.

(28) Condition 21. — Ontario stat. cond. twenty-one, the same as Quebec, except:

line 4, For *such purpose* read *the purpose.*

Condition 22.

"Every action or proceeding against the company for the recovery of any claim under or by virtue of this policy, shall be absolutely barred, unless commenced within one year next after the loss or damage occurs." (29)

This condition is discussed supra, p. 478.

Condition 23.

"Any written notice to the company for any purpose of the conditions of the policy, where the mode thereof is not expressly provided by law, may be by letter delivered at the head office of the company in the Province, or by registered post letter addressed to the company, its manager or agent, at such head office, or by such written notice given in any other manner to an authorized agent of the company." (30)

This condition is discussed supra, p. 483.

VARIATIONS AND ADDITIONS.

Art. 204.

"If the insurer desires to vary the said conditions, or to omit any of them, or to add new conditions, there shall be added to the contract containing the printed statutory conditions, words to the following effect, printed in conspicuous type and in ink of a different colour:

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(29) Condition 22. — Ontario stat. cond. twenty-two, the same as Quebec, except:

line 3, For *within* read *within the term of.*

(30) Condition 23. — Ontario stat. cond. twenty-three, the same as Quebec, except:

line 1, For *the company* read *a company.*

line 2, For *conditions of the policy* read *statutory conditions.*

line 3, *by law* is omitted.

line 4, For *the Province* read *Ontario.*

'VARIATIONS IN CONDITIONS.

"This policy is issued on the above conditions with the following variations and additions: (*set forth the conditions*).

"These variations are made by virtue of the Quebec Insurance Act, and shall have effect in so far as, by the court or judge before whom a question is tried relating thereto, they shall be held to be just and reasonable requirements on the part of the company."

The corresponding section to this article in the Ontario Act is s. 169, which reads as follows:

"169. If the insurer desires to vary the said conditions, or to omit any of them, or to add new conditions, there shall be added on the instrument of contract containing the printed statutory conditions words to the following effect, printed in conspicuous type and in ink of a different colour.

'VARIATIONS IN CONDITIONS.

"This policy is issued on the above statutory conditions with the following variations and additions:

"These variations (*or as the case may be*) are by virtue of the Ontario Statute in that behalf, in force so far as, by the Court or Judge before whom a question is tried relating thereto, they shall be held to be just and reasonable to be exacted by the company."

Art. 205.

"No such variation, addition or omission shall, unless the same is distinctly indicated and set forth in article 204, be legal and binding on the insured.

"It shall be optional with the insurers to pay or allow claims which are under the third, the fourth, or the eighth condition of the policy, in case the insurers think fit to waive the objections mentioned in the said conditions."

The corresponding section to this article in the Ontario Act is s. 170, which reads as follows:

"No such variation, addition or omission, shall, unless the same is distinctly indicated and set forth in the manner or to the effect aforesaid, be legal and binding on the assured; and no question shall be considered as to whether any such variation, addition or omission is, under the circumstances, just and reasonable, but on the contrary, the policy shall, as against the insurer, be subject to the statutory conditions only, unless the variations, additions or omissions are distinctly indicated and set forth in the manner or to the effect aforesaid.

"Provided it shall be optional with the insurers to pay or allow claims which are void under the 3rd, the 4th, or the 8th Statutory Condition, in case the insurers think fit to waive the objections mentioned in the said conditions."

The following provisions are contained in the Ontario Insurance Act which do not appear in the Quebec Act:

"171. In case a policy is entered into or renewed containing or including any condition other than or different from the conditions set forth in section 168 of this Act, if the said condition so contained or included is held, by the Court or Judge, before whom a question relating thereto is tried, to be not just and reasonable, such condition shall be null and void. (31)

RELIEF CLAUSE. (Ontario)

"172. (1) Where, by reason of necessity, accident or mistake, the conditions of any contract of fire insurance on property in this province as to the proof to be given to the insurance company after the occurrence of a fire have not been strictly complied with; or where after a statement or proof of loss has been given in good faith by or on behalf of the assured, in pursuance of any proviso or condition of such contract, the company, through its agent or otherwise, objects to the loss upon other grounds than for imperfect compliance with such conditions or does not within a reasonable time after receiving such statement or proof notify the assured in writing that such statement or proof is objected to, and what are the particulars in which the same is

(31) The effect of these differences from the Ontario statute are discussed supra p. 564.

alleged to be defective, and so from time to time; or where, for any other reason, the Court or Judge before whom a question relating to such insurance is tried or inquired into, considers it inequitable that the insurance should be deemed void or forfeited by reason of imperfect compliance with such conditions—no objection to the sufficiency of such statement or proof or amended or supplemental statement or proof (as the case may be) shall, in any of such cases be allowed as a discharge of the liability of the company on such contract of insurance wherever entered into.

(2) If in any action or proceeding upon a contract of fire insurance, the assured, being plaintiff in such action or proceeding, has in the opinion of the Court or Judge, wilfully neglected or unreasonably refused to furnish necessary information respecting the property for which the insurance money is claimed, and if as a consequence of such neglect or refusal, the defendant company has been at expense in obtaining information or evidence, the Court or Judge may, in disposing of costs, take into consideration the expense so incurred by the defendant company."

"173. A decision of a Court or Judge under this Act shall be subject to review or appeal to the same extent as a decision by such Court or Judge in other cases."

The failure to insert in the Quebec Insurance Act, a clause similar to s. 172 of the Ontario Insurance Act, may have been from a desire to have matters of this character governed by art. 2478 of the Code, which provides as follows:

"2478. In case of loss the insured must, with reasonable diligence, give notice thereof to the insurer; and he must conform to such special requirements as may be contained in the policy with respect to notice and preliminary proof of his claim, unless they are waived by the insurer.

"If it be impossible for the insured to give notice or to make the preliminary proof within the delay specified in the policy, he is entitled to a reasonable extension of time."

This article has been interpreted liberally by the Courts. *Vide* supra, pp. 440, 441.

APPENDIX (1)

No. 194.] **BILL.** [1900

An Act to secure Uniform Conditions in Policies of Fire Insurance.

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1. This Act may be cited as *The Fire Insurance Policy Act,* 1900.

2. In this Act, unless the context otherwise requires, the expression "company" means and includes any corporation or any society or association, incorporated or unincorporated, or any partnership carrying on the business of fire insurance.

(1) Vide note to page 16 supra.

This Bill is reproduced with two purposes, first to indicate some of the changes which it is thought could advantageously be made to the Statutory Conditions, and secondly, for the use if desired, of companies doing business in provinces where there are no statutory conditions, and where, therefore, the companies may insert in their policies such conditions as they deem proper. The provisions of the Bill may be readily adopted for this purpose by making the policies subject to the conditions in the schedule to the Bill eliminating the clause in brackets in Condition 10, line (1), and the reservation clause in the last lines of Condition 25, and by complying with the provisions of sections 6 and 7 of the Bill.

3. The provisions of this Act shall not apply to any company incorporated by an Act of the Legislature of the late Province of Canada, or by an Act of the Legislature of any Province now forming part of Canada, which carries on the business of fire insurance wholly within the limits of that Province by the Legislature of which it was incorporated, and which is within the exclusive control of such Legislature.

4. The conditions set forth in the form A in the schedule to this Act shall be deemed to be part of every contract of fire insurance hereafter entered into or renewed, or otherwise in force in Canada with respect to any property therein, or in transit therefrom, or thereto, and shall be printed on every policy, with the heading "Uniform Conditions", and no other or different condition shall be made a part of such contract or policy, or endorsed thereon, or delivered therewith: Provided that a policy may, with the approval of the Superintendent of Insurance, also contain any provisions which the company is required by law or by its charter or Act of incorporation to insert in its policies, and which are not inconsistent with the Uniform Conditions.

5. Where, by reason of necessity, accident or mistake, the conditions of any contract of fire insurance on property in Canada as to the proof to be given to the insurance company after the occurrence of a fire have not been strictly complied with, or where, after a statement or proof of loss has been given in good faith by or on behalf of the assured, in pursuance of any proviso or condition of such contract, the company does not, within a reasonable time after receiving such statement or proof, notify the assured in writing that such statement or proof is objected to, and specify the particulars in which it is alleged to be defective,—or where, for any other reason, the court or judge before whom a question relating to such insurance is tried or inquired into, considers it inequitable that the insurance should be deemed void or forfeited by reason of imperfect compliance with such conditions,—no objection to the sufficiency of such statement or

proof or amended or supplemental statement or proof (as the case may be) shall be allowed as a discharge of the liability of the company on such contract of insurance, wherever entered into.

2. If in any action or proceeding upon a contract of fire insurance, the assured, being plaintiff in such action or proceeding, has, in the opinion of the court or judge, wilfully neglected or unreasonably refused to furnish necessary information respecting the property for which the insurance money is claimed, and if, as a consequence of such neglect or refusal, the company has been at expense in obtaining information or evidence, the court or judge may, in disposing of costs, take into consideration the expense so incurred by the company.

3. A decision of a court or judge under this section shall be subject to review or appeal to the same extent as a decision by such court or judge in other cases.

6. Every policy of insurance subject to the provisions of this Act shall have conspicuously printed thereon the name and address of an agent in Canada, who shall represent the company for all purposes of this Act, and in default thereof any officer, agent or representative of the company who assumes on behalf of the company to enter into any written agreement relating to any matter connected with the insurance shall be deemed *primâ facie* to be agent of the company for such purpose.

7. When an application for insurance, subscribed by the applicant in person, or his agent, contains the warning in the form B in the schedule to this Act, printed immediately after the questions and answers in the application, in ink of a different colour from that in the body of the application, and with the word 'Warning' printed in type not smaller than double pica, and where the policy of insurance is based upon the said application and has annexed thereto, printed or written or partly printed and partly written in ink of a different colour from that in the body of the policy, a copy of the said warning, together with such questions, answers and provisions as the company desires

to have warranted, to the extent in the warning contained, then such warranty shall be binding upon the insured, and no question as to its materiality in case of loss shall be raised as between the insurer and the insured, and the company shall not be bound by any representation not contained in the application.

8. This Act shall take effect on the first day of September, one thousand nine hundred.

SCHEDULE.

A.

UNIFORM CONDITIONS.

1. If any person insures his buildings or goods and causes the same to be described otherwise than as they really are to the prejudice of the Company, or misrepresents or omits to communicate any circumstance which is material to be made known to the Company in order to enable it to judge of the risk it undertakes, this policy shall be void.

2. After application for insurance it shall be deemed that any policy sent to the assured is intended to be in accordance with the terms of the application, unless the Company points out, in writing, the particulars wherein the policy differs from the application.

3. Any change material to the risk and within the control or knowledge of the assured, shall avoid the policy, unless the change is promptly notified in writing to the Company, and the Company when so notified may return the premium for the unexpired period and cancel the policy, or may demand in writing an additional premium which the assured shall, if he desires the continuance of the policy, forthwith pay to the Company; and if he neglects to make such payment forthwith after receiving such demand, the policy shall be no longer in force.

4. This policy, unless otherwise provided by agreement en-

dorsed hereon, or added hereto, shall be void if any change other than by the death, succession or marriage of an insured take place in the interest, title or possession of the subject of insurance (except change of occupants without increase of hazard), whether by legal process, or judgment, or by voluntary act of the insured, or otherwise, or if this policy be assigned before a loss.

5. When property insured is only partially damaged, no abandonment of the same will be allowed, unless by the consent of the Company; and in case of removal of property to escape conflagration the Company will contribute to the loss and expenses attending such act of salvage proportionately to the respective interests of the Company or companies and the assured.

6. Money, books of account, securities for money, evidences of debt or title, are not insured.

7. Plate, bullion, jewellery, medals, paintings, sculptures, casts, curiosities, scientific and musical instruments, works of art, articles of vertu, frescoes, models, patterns, moulds, dies, plans and drawings, store and office furniture or fixtures, tools, are not insured unless mentioned in the policy, nor beyond the actual value destroyed by fire.

8. The Company is not liable for loss if there is any prior insurance, whether valid or not, in any other company, unless this Company's assent thereto appears herein or is endorsed hereon, nor if any subsequent insurance is effected in any other company, unless and until this Company assents thereto or unless this Company does not dissent in writing within two weeks after receiving written notice of such subsequent insurance or of the intention or desire to effect the same, or does not dissent in writing after that time and before the subsequent or further insurance is effected.

9. In the event of any other insurance on the property herein described having been assented to as aforesaid, then this Company shall, if such other insurance whether valid or not remains

in force on the happening of any loss or damage, only be liable for the payment of a rateable proportion of such loss or damage, without reference to the dates of the different policies.

10.—(*a.*) The Company is not liable for the losses following, that is to say:

(1.) For the loss of property owned by any other person than the assured, unless the interest of such other person is stated in or upon the policy, and liability is specifically assumed hereon.

(2.) For loss caused by invasion, insurrection, riot, civil commotion, military or usurped power, or by order of any civil authority; nor for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes or otherwise; or by theft, or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire, or when the property is endangered by fire in neighbouring premises.

(3.) When the insurance is upon buildings or their contents for loss caused by the want of good and substantial brick or stone chimneys; or by ashes or embers being deposited with the knowledge and consent of the assured, in wooden vessels, or by stoves or stove-pipes being, to the knowledge of the assured, in an unsafe condition, or improperly secured.

10.—(*b.*) This policy, unless otherwise provided by agreement endorsed hereon or added hereto shall be void.

(1.) If the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be a building on ground not owned by the insured in fee simple, or other freehold tenure, or (where warning has been given as provided in section 7 of the *Fire Insurance Policy Act,* 1900), which becomes encumbered by any charge, lien, execution, mortgage or other hypothecary claim, or if the subject of insurance be personal property and become encumbered by a chattel mortgage or hypothecary claim, or if, with the knowledge of the insured, foreclosure proceedings be commenced, or notice given of

sale of any property covered by this policy by virtue of any mortgage or trust deed.

(2.) Or if the subject of insurance be a manufacturing establishment, and cease to be operated for more than thirty consecutive days.

(3.) Or if a building herein described, whether intended for occupancy by owner or tenant be or become vacant or unoccupied, and so remain for thirty days.

(4.) Or if the goods are destroyed or damaged while undergoing any process in or by which the application of fire heat is necessary.

(5.) Or where loss or damage occurs to buildings or to their contents while the buildings are being repaired by carpenters, joiners, plasterers, or other workmen, and in consequence thereof; but in dwelling-houses fifteen days are allowed in each year for incidental repairs without such permission.

(6.) Or if illuminating gas or vapour be generated in the described building (or adjacent thereto) for use therein, or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises, acetyline gas, natural gas, calcium carbide, benzine, benzole, ether, gasoline, naphtha, fire works, greek fire, dynamite, nitro-glycerine, gunpowder (exceeding twenty-five pounds in quantity), phosphorus, or other like inflammable or explosive substances, or petroleum or any of its products of greater inflammability than kerosene oil of the Canadian standard (which last may be used for lights and kept for sale according to law, but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight, or at a distance not less than ten feet from artificial light).

(7.) Or if a building or any part thereof fall, except as a result of fire.

11. The Company will make good loss caused by the explosion of coal gas in a building not forming part of gas works,

and loss by fire caused by any other explosion, or caused by lightning, but liability for direct damage by lightning may be assumed by specific agreement hereon.

12. Proof of loss must be made by the assured, although the loss be payable to a third party.

13. Any person entitled to make a claim under this policy is to observe the following directions:—

(*a.*) He is forthwith after loss to give notice in writing to the Company.

(*b.*) He is to deliver as soon afterwards as practicable to the Company, as particular an account of the loss as the nature of the case permits, stating the quantity, cost and cash value of each subject matter of insurance and the amount of loss thereon.

(*c.*) He is also to furnish therewith a statutory declaration, declaring:

That the said account is just and true;

When and how the fire originated, so far as the declarant knows or believes;

The interest of the assured and of all others in the property;

All liens and encumbrances on the subject of insurance;

All other insurance, whether valid or not, covering any of the said property;

A copy of all the descriptions and schedules in all policies, and all changes in the title, use, occupation, location, possession or exposures of said property, since the issue of this policy;

By whom, and for what purpose any building herein described, and the several parts thereof, were occupied at the time of the fire;

That the fire was not caused through his wilful act or neglect, procurement, means or contrivance.

(*d.*) He is, in support of his claim, if required, and if practicable, to produce books of account, bills, warehouse receipts and stock lists, and to furnish invoices and other vouchers or certified copies thereof if originals be lost, and shall furnish, if

required, verified plans and specifications of any buildings, fixtures, or machinery destroyed or damaged at such reasonable place as may be designated by this Company or its representative, and shall permit extracts and copies thereof to be made, and shall exhibit for examination as often as required, to any person designated by this Company, all that remains of any property herein described, and shall submit to examination under oath by any Justice of the Peace, Police Magistrate or Notary Public, named by this Company, and subscribe to his deposition.

(*e.*) He is to produce, if required, a certificate under the hand of a Justice of the Peace, Police Magistrate, Notary Public, Commissioner for taking affidavits, or Municipal Clerk, residing in the vicinity in which the fire happened and not concerned in the loss or related to the assured or sufferers, stating that he has examined the circumstances attending the fire, loss or damage alleged, that he is acquainted with the character and circumstances of the assured or claimant, and that he verily believes that the assured has, by misfortune, and without fraud or evil practice, sustained loss and damage on the subject assured.

(*f.*) After any loss or damage to insured property the Company shall have the immediate right of entry by its agent or representative, and access sufficient to survey and examine the property and make an estimate of the loss or damage, but the Company shall not be entitled to the disposition, control, occupation or possession of the insured property, or of the remains or salvage thereof, unless the Company undertakes re-instatement or accepts abandonment of the property.

(*g.*) After any loss or damage to insured property, the insured shall, as soon as practicable, secure the insured property from further damage, and separate as far as reasonably may be, the damaged from the undamaged property, and notify the Company when such separation has been made, and thereupon the Company shall be entitled to entry and access sufficient to make an appraisement or particular estimate of the loss or damage.

14. The above proofs of loss may be made by the agent of the assured in case of the absence or inability of the assured himself to make the same, such absence or inability being satisfactorily accounted for.

15. Any fraud or false statement in a statutory declaration in relation to any of the above particulars, shall vitiate the claim.

16. In the event of disagreement as to the amount of loss, whether total or partial, the same shall be ascertained by two competent and disinterested appraisers, the insured and this Company each selecting one, and the two so chosen shall first select a competent and disinterested umpire. The appraisers together shall then estimate and appraise the loss in detail (so far as the case permits), stating separately sound value and damage, and failing to agree shall submit their differences to the umpire, and the award in writing of any two shall determine the amount of such loss. The parties thereto shall pay the appraiser respectively selected by them, and shall bear equally the expenses of the appraisal and umpire. In case of the refusal or neglect of either party to appoint an appraiser, or of the two so appointed to appoint an umpire, such appointment may be obtained in manner following namely: either party may apply, upon two days' notice, to the other to appoint such appraiser or umpire, as the case may be, to the County Judge of the county or district wherein the loss has occurred, if there be such County Judge, and if there be no such judge, the application may be made to any judge of a Superior Court having jurisdiction in such county or district.

17. This Company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality. The loss shall not be payable until sixty

days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required, have been received by this Company, including an award by the appraisers when appraisal has been required.

18. The Company, instead of making payment, may repair, rebuild, or replace within a reasonable time, the property damaged or lost, with other of like kind and quality, giving notice of their intention within fifteen days after receipt of the proofs herein required, and it shall be optional with the Company to take all or any part of the articles saved at such ascertained or appraised value.

(*a.*) This Company shall not be held to have waived any provision or condition of this policy, or any forfeiture thereof, by any requirement, act or proceeding on its part relating to any of the matters set out in conditions 13 and 16 hereof.

19. The insurance may be terminated by the Company by giving notice to that effect; in the case of personal service of the notice, five days' notice, excluding Sunday, shall be given. Notice may be given by any company by registered letter addressed to the assured at his last post office address notified to the Company, and when no address notified, then to the post office of the agency from which the application was received, and when such notice is by letter, then seven days from the arrival at any post office in Canada shall be deemed good notice. And the policy shall cease after such notice aforesaid, and the expiration of the five or seven days, as the case may be. If the policy shall be cancelled, as hereinbefore provided, or become void, or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this Company retaining the customary short rate, except that when this policy is cancelled by this Company by giving notice, it shall retain only the *pro rata* premium.

(*a.*) The insurance, if for cash, may also be terminated by the assured by giving written notice to that effect to the Company or its authorized agent, in which case the Company may

retain the customary short rate for the time the insurance has been in force and shall repay to the assured the balance of the premium paid.

20. No action or proceeding against the ompany for the recovery of any claim under or by virtue of this policy shall be brought until after a full compliance has been made by the assured with all the foregoing requirements, nor unless commenced within one year next after the loss or damage occurs.

21. This policy may by a renewal, be continued under the original stipulations, in consideration of premium for the renewed term, provided that an increase of hazard must be made known to this Company at the time of renewal, or this policy shall be void.

22. If, with the consent of this Company, an interest under this policy shall exist in favour of a mortgagee or of any person having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in any subrogation clause or other provision or condition of insurance relating to such interest as shall be written upon, attached, or appended hereto.

23. The extent of the application of the insurance under this policy, or of the contribution to be made by this Company in case of loss under co-insurance, distribution, or clauses of similar effect or purpose, may be provided for by agreement or condition written hereon, or attached or appended hereto. In all cases where there is other insurance subject to the conditions of average or co-insurance or any special advantages not concurrent with the insurance by this policy, this policy shall be subject to the same special advantages and the conditions of average or co-insurance in like manner.

24. If this company shall claim that the fire was caused by the act or neglect of any person or corporation, this Company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss re-

sulting therefrom, and such right shall be assigned to this Company by the insured on receiving such payment.

25. This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions and agreements as may be indorsed hereon, or added hereto, pursuant to any of the above conditions, and no officer, agent or other representative of this Company shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement endorsed hereon, or added hereto, and as to such provisions and conditions, no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver (if any) shall be written hereon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached. In any matter relating to this insurance no person, except the agent or agents whose names are printed hereon, shall be deemed the agent of this Company, unless duly authorized in writing, subject, however, to the provisions of section 6 of the *Fire Insurance Policy Act of* 1900.

B.

Warning.

The person soliciting the application for this insurance has no power or authority other than to receive and forward to the company applications for insurance, to receive the premium for the insurance, and to deliver an interim receipt binding the company according to the terms and provisions therein expressed. If such person soliciting insurance inserts in the application the answers to the questions therein contained, or any provisions

relating to user or protection of the insured property, he shall for such purpose be deemed the agent of the applicant solely, and not the agent of the company, and the company shall not be bound by any representations made to or by such person and not contained in the application.

Mortgages and other encumbrances on property insured are deemed material to be made known to the company.

The applicant will be taken to have warranted that the answers made to the questions in the application are reasonably full and substantially true and accurate, and that the provisions relating to user or protection of the proporty will be substantially complied with.

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